Supreme Court of the United States

No. 26

EXHIBITS TO RESPONDENT'S PETITION FOR REHEARING

D. EX. 28

April 10, 1954

Atomic Energy Commission
Washington, D. C.

Attention: General K. D. Nichols
General Manager

Dear Sirs:

In response to the suggestion in the President's Budget Message that the power industry might furnish 500,000 to 600,000 kilowatts to your Commission by the Fall of 1957, Middle South Utilities, Inc. and The Southern Company submitted a proposal to you under date of February 25, 1954. It was our understanding of the Budget Message that this power was desired in order to reduce the commitments of Tennessee Valley Authority to your Commission for service at Paducah, with a resultant reduction in the amount of capital expenditures which would have to be budgeted for TVA. Our proposal was designed to accomplish that purpose.

As you know, our February 25th proposal was formulated upon short notice and on the basis of data which was not as complete as is desirable in connection with such a matter. Since February 25th, we have acquired additional information and have had time for further study. As a result, we are pleased to be able to make an offer to your Commission on a more favorable basis. Accordingly, we hereby withdraw our letter of February 25, 1954, and submit to you the proposal set forth in this letter and the accompanying Appendix.

Our proposal provides for rates, exclusive of taxes, having a base annual demand charge of $14.62½ per kilowatt-year, subject to variation up or down in case of increase or decrease in actual cost of construction as compared with the present estimate, with a maximum increase of 47½¢ per kilowatt-year. The base energy charge is 1.863 mills per kilowatt-hour, which is estimated cost, subject to variation up or down in case of increase or decrease in fuel costs and wage rates.

In considering our proposal for purposes of comparison, it is important to bear in mind that there are two classes of factors to be weighed. One class includes those where a Government agency enjoys advantages not available to private industry and with which private industry cannot hope to compete—Government credit, freedom from taxation, certain subsidies, etc. The other class of factors has to do with performance. As to the latter, private industry can perform at least as well as Government and is willing to face any fair comparison. In the present proposal, an attempt has been made, insofar as possible, to separate these two classes of factors so that a fair comparison may be made.

It is, of course, impossible to know now, on the basis of presently estimated cost, what the actual ultimate cost of a new plant will be. The effect of our proposal, however, is to provide that if the actual construction cost is less than anticipated the Government is to participate equally with us in the benefits from such reduction. Its effect also is to provide that if the construction cost exceeds the estimate, the resulting increased costs are to be divided equally between us and the Government, except that there is a guaranteed maximum above which the Government does not bear any such additional costs and we bear them all. Thus the Government is provided with a ceiling—we with an incentive to benefit the Government as well as ourselves.

Under our proposal, a new corporation to be formed by us will make the expenditure to build the plant, and the taxpayers will make only annual payments related to the annual cost of supplying the power for the 25-year period of the contract. Moreover, if the Government's need for this power should for any reason come to an end, the Government may terminate its contractual obligation on a reasonable basis and thereby relieve the taxpayers of any further payments on account of power their Government no longer needs or uses.

Every consideration has been given to the fact that a 25-year contract with the United States Government, acting through your Commission, will tend to lower the cost of money to the new corporation. Full allowance has been made for the lesser risk of a government contract as compared with risks in normal situations involving relatively short-term contracts with ordinary businesses. As is indicated in the Appendix, we have also given full consideration to the fact that the power involved will be utilized by the Government itself for a purpose related in the main to defense. Naturally, under such special circum-

stances, we are able to finance with a substantially larger proportion of long term debt than would be permitted by regulatory authorities in a normal public utility situation. Moreover, we are willing and able to go further in this special defense situation than we otherwise would.

As stated above, our proposal has been formulated with the end in view of supplying power and energy to your Commission, an agency related in the main to national defense, for use in pursuance of your statutory purposes. At the same time, however, we have attempted by our proposal to assist the Government in the solution of a broader overall problem. TVA testimony before Congressional Committees indicates that the power released by your Commission upon acceptance of our proposal will be of use to TVA in West Tennessee, and particularly in the Memphis area. It will therefore be both practical and economical if deliveries by our new generating company are made to you or for your account over interconnections with TVA in the Memphis area, and if TVA, in turn, delivers a like amount of power to your Paducah facilities from its Shawnee Station. To do this, the facilities of the new company will be located near Memphis. This plant site will have the following advantages: (a) it will locate the plant where fuel can be readily obtained via the Mississippi River or by rail; (b) it will locate the plant where interconnections can be readily made with major power systems; (c) it will make it unnecessary for TVA to build transmission lines back from Shawnee to the Memphis area, thus avoiding assessment of further amounts against taxpayers for this purpose; and (d) the additional capacity will not be built in the Paducah area which, if the AEC demand were cancelled, would be oversupplied with power.

Both the Middle South System and the Southern Company System have regularly delivered substantial blocks of power to TVA over existing interconnections. If interim power is desired, the undersigned are prepared to negotiate a separate definitive agreement for such purpose.

We have received assurances from responsible financial specialists expressing the belief that financing can be arranged on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon the arranging of such financing. Our proposal is also subject to our securing appropriate Treasury Department rulings or agreements with respect to the sinking fund depreciation upon which the computations underlying our proposal are predicated.

The attached Appendix sets forth an outline of additional matters in our proposal, including the more important provisions which will be embodied in a contract growing out of it. We are ready to negotiate a definitive contract at your early convenience.

Very truly yours,

MIDDLE SOUTH UTILITIES, INC.

By E. H. DIXON
President

THE SOUTHERN COMPANY

By J. M. BARRY
Chairman of the Executive Committee

APPENDIX

Price.

CAPACITY CHARGE —A Base Capacity Charge of $8,775,000 annually, payable 1/12 monthly for Contract Capacity of 600,000 Kw, subject to adjustment as follows:

(a) For cost of Seller's Initial Facilities: plus or minus 50% of an amount computed at the rate of $58,550 annually for each $1,000,000 by which the sum of (i) the cost of Seller's Initial Facilities and (ii) $1,135,000, the estimated cost of transmission additions required in the Middle South System in connection with the proposed transactions is greater or less than $107,250,000; provided however, additions to Base Capacity Charge shall not exceed $285,900.

(b) For No-Load Fuel: plus or minus an amount computed at the rate of $3500 per month for each 1¢ by which the cost of coal delivered (unloaded) at Seller's plant is greater or less than 19¢ per million Btu.

(c) For Power Factor of less than 93%: the monthly payment for capacity shall be increased in the ratio of the maximum Kva at the Primary Delivery Points during any 30 consecutive minute interval, to 645,000 Kva.

ENERGY CHARGE —1.863 mills per Kwh delivered at Primary and Secondary Delivery Points, subject to adjustment as follows:

(a) For cost of Coal: plus or minus an amount computed at the rate of 1/11 mill per Kwh for each one cent increase of decrease above or below 19¢ per million Btu in the cost of coal (including any taxes and other imposts assessed against the coal, its extraction, sale, transportation, use or otherwise) delivered (unloaded) at the Com-

pany's generating station near West Memphis, Arkansas.

(b) For cost of labor and other operating and maintenance expenses for each six month period beginning with January or July: plus or minus an amount computed at the rate of 1/100 mill per Kwh for each 4¢ increase or decrease above or below $1.97 in the six-month average of Hourly Earnings of Production Workers in Gas and Electric Utility Industries, as compiled by Bureau of Labor Statistics for the preceding six-month period ending with March or September. Such adjustment shall be made as though not less than 1/12th of 4,000,000,000 Kwh were delivered each month, whether or not actually delivered.

OTHER CONDITIONS—(1) This offer is subject to approval of regulatory bodies having jurisdiction and to force majeure. In the event of new laws, orders or regulations or changes in existing applicable laws, orders or regulations adversely affecting wage rates, hours of work or other conditions, or active hostilities, any of which shall result in increased costs hereunder, the effect of such changes shall be incorporated in any contract resulting from this offer to the end that the rights of the Seller shall not be impaired by such changes, and the parties will enter into appropriate amendments of such contract to that end.

(2) In consideration of the fact that Seller's production, delivery and other Initial Facilities are to be installed primarily for the purpose of making deliveries to or for the account of the Buyer, and that the base prices and adjustments for the service to be provided hereunder do not include any taxes except those referred to below in clause (a), it is understood that the Buyer will pay such additional amounts for capacity and

energy as will result, after the payment by Seller of Federal, State and local taxes, licenses, fees and other charges in the Seller having Net Operating Revenue (as such term is defined or derived under the presently applicable Federal Power Commission Uniform System of Accounts) in the same amount as Seller would have had if Seller were not liable for any taxes, licenses, fees and other charges; provided, however that:

(a) Inasmuch as the taxes hereinafter referred to are included in other reimbursable costs or charges, Buyer shall not be required to pay to Seller any additional amounts on account of taxes at current rates in the category commonly called Social Security taxes (such as State Unemployment, Federal Unemployment, Federal Old Age Benefit, or similar taxes) currently applicable to payrolls; nor shall Buyer be required to pay to Seller any additional amounts on account of sales and use taxes on operating supplies, taxes and other imposts assessed against the coal, its extraction, sale, transportation, use or otherwise, at currently applicable rates, including Federal, State and local taxes on gasoline, tires, oils, stationery, etc. and

(b) All the Seller's Initial Facilities are to be first devoted to service to Buyer, up to the Contract Capacity, but Seller may make use of Initial Facilities for purposes other than the supply of capacity and energy to or for Buyer at such times and to such extent as such service to Buyer does not prevent such other use; and to the extent that the

Initial Facilities are so used for such other purposes and Seller derives income therefrom and incurs tax liabilities as a result thereof, such tax liabilities shall be discharged at the sole cost and expense of Seller. Seller will maintain records of the revenue derived from such other use, and the incremental cost of generating such energy, so that the tax liabilities arising out of such other use may be determined and excluded from bills payable by Buyer.

(3) Buyer will take service on not less than Minimum Schedule and shall not be entitled to service at any rate greater than Contract Capacity.

(4) The Base Capacity Charge includes the costs associated with Initial Facilities of approximately 650,000 Kw, of which capacity in excess of 600,000 Kw is reserve capacity, and the Base Capacity Charge includes the costs associated with such excess as compensation to Seller for furnishing reserve capacity sufficient to provide firm service with one unit out of service. In recognition of the fact that such reserve capacity is not adequate to provide the equivalent of one generating unit of the size likely to be installed, Seller will make arrangements with others, including the companies making this proposal, to furnish, without additional charge to Buyer, additional supplies of power and energy sufficient, with one generating unit out of service to deliver 600,000 Kw at the Primary and Secondary Delivery Points.

(5) This offer is premised on the fact that the equivalent of the power and energy involved will be utilized by the AEC, an agency related in the

main to national defense, in pursuance of its statutory purposes. In this special situation, Seller is willing and able to go further than it otherwise would or could. Accordingly, it is understood that TVA will accept such power and energy for delivery to Buyer by transmission or displacement, and that all such power and energy is for Buyer's utilization, and not for resale except as otherwise specifically provided.

(6) The term of the contract will be 25 years.

(7) Termination:

(a) After commencement of full scale operation, termination will be allowed on 3 years' notice, during which period assignment may be made to another Governmental Agency, at contract rates, including all taxes and other adjustments.

(b) Upon termination Seller shall be entitled to and will absorb capacity at least as rapidly as load growth will permit, but in any event in the amount of at least 100,000 Kw in each year, absorbing associated proportions of costs. Buyer may assign any balance to another Governmental agency at an increased price to be approved by FPC, such price to include recognition of any increased costs then encountered or foreseen by Seller. To extent such capacity is not used by Buyer or Assignee, Buyer will reimburse Seller for pro rata proportion of Base Capacity Charge, as adjusted, and taxes.

(c) In event of partial termination above formula will be applied on a pro rata basis.

(d) In event Buyer relinquishes right to Capacity after termination, Base Capacity Charge (including adjustments) will be thereafter reduced $1,500,000 proportionally in case of partial reductions.

(e) Buyer will repay Seller for any fair and reasonable cancellation charges payable by Seller to a third party and costs, losses and other expenses incurred by Seller by reason of cancellation.

(8) Seller will use its best efforts to have the first unit of the generating station in operation 36 months after the contract is entered into, and to have subsequent units in operation at reasonable intervals thereafter.

(9) Seller will receive cooperation from Buyer for any necessary priority assistance.

(10) Buyer will arrange with TVA for receipt and displacement of power and energy.

(11) There will be a pro rata determination of capacity charge during interim between completion of the first generating unit and the final generating unit.

(12) Miscellaneous.—The contract will also contain, among other things, provisions, similar in principle to those hereinafter referred to contained in the Buyer's Power Agreement with Ohio Valley Electric Corporation dated October 15, 1952, relating to transfers of energy for use at other government installations (Sec. 2.05, paragraphs 2, 3 and 4 and Sec. 7.12), extensions of contract term for two additional periods of five years each (Sec. 3.09), review of Seller's plans and procedures (Sec. 3.10), purchase of fuel (Sec. 7.02), review and audit of Seller's accounts, (Sec. 7.04), all in such form as may be mutually agreed upon.

ONS

—New Company to be formed by Middle South Utilities, Inc. and The Southern Company.

—Atomic Energy Commission.

—Tennessee Valley Authority.

—New points of delivery to be established, by agreement among Buyer, Seller and TVA, at the middle of the Mississippi River between Shelby County, Tennessee, and Crittenden County, Arkansas.

—Existing and future points of connection between systems of Seller, Arkansas Power & Light Company, Mississippi Power & Light Company, subsidiaries of The Southern Company and TVA, it being understood that the flow of power and energy cannot always be confined to Primary Delivery Points.

—A new steam electric generating station to be constructed by Seller, of approximately 650,000 Kws capacity (approximately 50,000 in excess of Contract Capacity, for reserve), together with all other lines, property, equipment and other assets and debits of Seller, including $2,000,000 of net current assets as working capital, acquired for the purpose of or incident to making or carrying out of this proposal. Additional facilities that may be constructed subsequent to completion of Initial Facilities shall have no effect on this proposal or any resulting agreement.

—600,000 kilowatts.

Minimum Schedule —Not less than 35% of Contract Capacity, which is the minimum capacity and energy which can be economically produced by Seller's production facilities, not less than which will be scheduled for delivery at all times except upon reasonable notice of reduced requirements, and for resumption of minimum or greater requirements.

April 10, 1954

TABLE OF DOCUMENTS.

1. Power Contract No: AT-(49-1)-814, dated November 11, 1954, as modified by Supplement No. 1 dated November 11, 1954, which supplement

   (a) added Sections 4.15 and 7.09, and

   (b) revised Sections 7.08 and 8.23;

2. Interpretative Memorandum re Power Contract; with covering letter dated November 11, 1954.

3. Letter agreement dated November 11, 1954 with reference to the execution and delivery of the Power Contract.

4. Explanatory letter dated November 11, 1954 re Item 3.

5. Letter Contract No. AT-(49-1)-815 dated November 11, 1954 with Middle South Utilities, Inc. and The Southern Company.

6. Letter dated November 14, 1954 from Middle South Utilities, Inc. and The Southern Company as to access to load data.

7. Letter from the Atomic Energy Commission, dated November 23, 1954 re interpretation of Section 4.14 of Power Contract.

8. Letter from Mississippi Valley Generating Company, dated November 24, 1954 in answer to Item 7.

9. Resolution, adopted November 12, 1954, by the Joint Committee on Atomic Energy.

10. Opinion of the Comptroller General, dated October 5, 1954.

11. Opinion of the Attorney General, dated October 20, 1954.

12. Opinion of the General Counsel of the Atomic Energy Commission, dated November 11, 1954.

13. Opinion of the Comptroller General, dated December 13, 1954.

14. Letter from the Atomic Energy Commission to the Comptroller General, dated December 2, 1954, requesting the opinion included herein as Item 13.

15. Opinion of the General Counsel of the Atomic Energy Commission, dated January 6, 1955.

WHEREAS, the Proposal contemplates that the Company will construct and own a generating station having a net capability of approximately 650,000 kilowatts and will furnish, even though one unit in the generating station may be out of service, 600,000 kilowatts of power to the AEC, or to the Tennessee Valley Authority (herein called TVA) for account of the AEC in replacement of power furnished by TVA to the AEC; and

WHEREAS, the Proposal contemplates that, of the approximately 650,000 kilowatts of net capability of the new plant, approximately 50,000 kilowatts will be available toward providing the required reserve to supply service hereunder, and inasmuch as such 50,000 kilowatts is not adequate for such purpose when one generating unit is out of service, the Company is making arrangements with the systems of the Sponsoring Companies so that, in return for the Company's making available to such systems such 50,000 kilowatts of capacity when no units are out of service, such systems will make available to the Company as additional reserve for the Company's obligation to the AEC, at no additional cost to the AEC, up to approximately 200,000 kilowatts of additional back-up capacity when a unit or units of the Facilities are caused to be shut down; and

WHEREAS, the Proposal was stated by the AEC to constitute a satisfactory basis for negotiation, and this contract has been negotiated pursuant thereto; and

WHEREAS, the Proposal and this contract are based upon the utilization by the AEC, an agency related in the main to national defense, of power and energy delivered hereunder or its equivalent in pursuance of the statutory purposes of that agency, and the Company has stated that in this special situation the Company is willing and able to assume an undertaking which it could not otherwise assume; and

WHEREAS, the AEC is making arrangements with TVA whereby TVA will accept deliveries of power and energy hereunder for or on account of the AEC; and

WHEREAS, in pursuance of the Proposal, the Sponsoring Companies have caused the Company to be organized and have respectively agreed to subscribe to and purchase for cash capital stock of the Company as

follows: Middle South Utilities, Inc., $4,345,000; The Southern Company, $1,155,000; and

WHEREAS, among the considerations which induced the Sponsoring Companies to make the Proposal and to cause the same to be carried out is the reservation to the Company of the right to make use of the Facilities hereinafter described for purposes other than the supply of capacity and energy to or for the AEC at such times and to such extent as such service to or for the AEC does not prevent such other use; and

WHEREAS, arrangements are being made on behalf of the Company with certain institutional investors and banks pursuant to which they will lend funds up to $120,000,000 for that part of the capital required by the Company not represented by the equity participations of the Sponsoring Companies referred to above; and

WHEREAS, this contract is authorized by and executed pursuant to the Atomic Energy Act of 1954, for the purpose of providing electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the project;

NOW, THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

ARTICLE 1.

Definitions.

SECTION 1.01. *Facilities:* The Facilities, to be constructed, installed and owned by the Company, will consist of a steam electric generating station of approximately 650,000 kilowatts of net capability, together with all other lines, property and equipment, including general equipment, near West Memphis, Arkansas, all as described in greater detail in Appendix A hereto. The Company in the future shall have the right to build additional facilities, including additions to the Facilities at the same site, provided that any such additions shall not affect this contract except as provided in Section 4.13 or result in an increase in the obligations of the AEC hereunder.

SECTION 1.02. *Primary Delivery Points:* The Primary Delivery Points shall consist of points of delivery over which principal deliveries hereunder are intended to be made, established by agreement among the

AEC, the Company and TVA at the Tennessee-Arkansas state line between Shelby County, Tennessee, and Crittenden County, Arkansas.

SECTION 1.03. *Secondary Delivery Points:* In view of the fact that the flow of energy cannot always be confined to Primary Delivery Points, Secondary Delivery Points (described or referred to in Appendix B) shall consist of other existing and future direct and indirect connections between the systems of the Company and of subsidiaries of the Sponsoring Companies, and TVA.

SECTION 1.04. *Contract Capacity:* Contract Capacity, which shall be applicable after the commencement of commercial operation of the third unit included in the Facilities, shall be 600,000 kilowatts, which is the amount of capacity to be available to the AEC at the Primary Delivery Points and Secondary Delivery Points on the terms and conditions herein set forth, even though one generating unit of the Facilities may be out of service; *provided however*, that if the Facilities when completed and in commercial operation shall have a net capability greater or less than 650,000 kilowatts, then Contract Capacity shall be increased or decreased, as the case may be, by 60/65ths of the difference between such net capability and 650,000, and *provided further*, that Contract Capacity shall be subject to reduction upon termination or cancellation as provided in Sections 7.02, Section 7.03 and paragraph 3 of Section 7.07. For the purpose of this provision net capability shall be determined by mutual agreement as soon as practicable but not later than 18 months after the commencement of commercial operation of the third generating unit, at 5 year intervals thereafter, and at such other times as may be mutually agreed upon; *provided however*, that if during any such interval actual operating experience shall indicate that the net capability as last determined is too high or too low, the parties agree that a new determination shall be made promptly. For the period between the commencement of commercial operation of the first generating unit and the initial determination of net capability, the net capability for the purpose of determining Contract Capacity shall be taken at 650,000 kilowatts. For any period subsequent to a determination of net capability and prior to the next succeeding determination of net capability, net capability shall be as last so determined.

SECTION 1.05. *Capacity Charge:* The Capacity Charge shall consist of the Base Capacity Charge as adjusted, all as hereinafter provided in Sections 4.01, 4.02, 4.03 and 4.10.

SECTION 1.06. *Energy Charge*: The Energy Charge shall consist of the Base Energy Charge as adjusted, all as hereinafter provided in Sections 4.04, 4.05 and 4.06.

SECTION 1.07. *Preliminary Contract Capacity:* See Section 4.07.

SECTION 1.08. *Preliminary Capacity Charge:* See Section 4.07.

SECTION 1.09. *Project:* Project shall mean the Oak Ridge installation, the Paducah installation, or the Portsmouth installation of the AEC or any other AEC installation for which it may become lawful for the AEC to receive electric utility service under this contract.

SECTION 1.10. *Net Capability:* Net capability shall mean the maximum amount of power which can be continuously generated during a reasonable test period, less the amount required in the generating station for auxiliary uses and losses in the step-up transformers to the high voltage bus, under conditions in which all normally operated equipment is in service, equipment is in an average state of maintenance and cleanliness, with the fuel consumed being of the average quality purchased, with normal steam conditions and normal interstage extraction from the turbines, with generators operating with usual coolant pressure and at the voltage required under normal operating conditions and at the power factor for the total net output not less than the power factor calculated as required to deliver the total net output, less losses, at the Primary Delivery Points at 93% power factor, and with circulating water temperature and cleanliness normal for mid-summer.

ARTICLE II.

Company to Provide Facilities.

SECTION 2.01. *Construction and Operation of Facilities:* The Company will expeditiously design and construct the Facilities, and will exert its best efforts to have the generating units included in the

Facilities ready for commercial operation on dates determined as follows:

	Months after Effective Date of this Contract
1st Unit	32
2nd Unit	34
3rd Unit	36

The Company agrees to use its best efforts to have the transmission circuits and control equipment included in the Facilities ready for commercial operation as needed in connection with the commercial operation of the foregoing generating units. The Company further agrees that the Facilities when and as completed will be operated and maintained, in accordance with the practices prevailing among prudent operators of similar properties, to provide for the delivery of electric energy to or for the AEC as provided herein.

SECTION 2.02. *Interconnections with Sponsoring Companies:* The Company will establish or cause to be established interconnections between the Facilities and the systems of the Sponsoring Companies, directly or indirectly, by means of which there will be afforded additional security of service under this contract from such systems, and an outlet for power and energy produced at the Facilities and from time to time not needed for deliveries to or for the AEC hereunder. The Company represents that it is entering into a contract or contracts with the Sponsoring Companies or subsidiaries thereof to provide power to the Company over such interconnections for a period of 25 years after the beginning of initial commercial operation for the purposes of (a) enabling the Company to deliver hereunder the full Preliminary Contract Capacity or the full Contract Capacity, as the case may be, even though one generating unit of the Facilities may be out of service, and (b) making available from the Facilities to subsidiaries of the Sponsoring Companies or others power which from time to time is not needed by the Company to furnish the power to which the AEC is entitled hereunder. Energy taken by systems of the Sponsoring Companies will be charged to such systems at not less than the incremental cost thereof.

SECTION 2.03. *Cooperation in Coordination of Systems:* The Company will cooperate with the AEC and TVA in the coordination of design and operation of line terminal positions, circuit breakers, and system relay protection and communication and telemetering and control equipment, including equipment to meet the Company's bias frequency obligations to and from the interconnected power systems, to the extent required to obtain reliable and satisfactory performance of such equipment, to assure reliability of deliveries as scheduled and to minimize disturbances to any of the interconnected systems. The Company will also cooperate in the scheduling of maintenance and overhaul of the Facilities to the end that service under this contract shall be interfered with to the minimum practicable extent. The AEC may designate TVA from time to time as its authorized representative to act for the AEC in various technical aspects of this contract, such as the coordination of design and construction, the scheduling of power, billing verification (including the scheduling and witnessing of meter tests), and coordination of maintenance operations. It is contemplated that any such designations will be worked out after discussions between the AEC, the Company and TVA.

SECTION 2.04. *Priority Assistance:* The AEC will use its best efforts in aiding the Company and the Sponsoring Companies or their subsidiaries to obtain any priorities which may be necessary for the expeditious construction of the Facilities and of such generating and transmission facilities of subsidiaries of the Sponsoring Companies as the AEC deems necessary for the security of service to it hereunder.

SECTION 2.05. *Ownership of Facilities:* All the Facilities shall be the responsibility of the Company and shall be and remain the property of the Company.

SECTION 2.06. *Review and Recommendations by the AEC:* While it is recognized that the construction and operation of the Facilities are the responsibility of the Company, the costs thereof are related to the AEC's cost of power under this contract. Accordingly, the AEC may review and discuss with the Company its engineering design, purchasing, subcontracting, construction and operating plans, estimates, practices and procedures and make recommendations with respect

thereto which in the judgment of the AEC may provide for economies in construction and operation, for assuring reliability of service hereunder, and for assurance that the Facilities are designed to conform as nearly as is practicable with this contract and Appendix A hereto; and the Company will adopt such recommendations of the AEC as may be mutually agreed upon. The AEC shall have access to the Facilities for this purpose. The Company will keep the AEC reasonably informed as to prospective dates of commercial operation of the various units included in the Facilities, and shall furnish the AEC monthly progress and cost reports in such reasonable detail as will adequately reflect current status.

ARTICLE III.

Power Supply.

SECTION 3.01. *Service to be Supplied by Company and Taken by AEC:* After commencement of commercial operation of the first unit and prior to commencement of commercial operation of the third unit of the Facilities, the Company shall be obligated to supply, and the AEC to pay for, the Preliminary Contract Capacity under and subject to the provisions of this contract, and after commencement of commercial operation of the third unit the Company shall be obligated to supply, and the AEC to pay for, the Contract Capacity under and subject to the provisions of this contract; *provided however*, that if more than one generating unit included in the Facilities shall be shut down by reason of conditions beyond the Company's control, or if one such unit shall be shut down for scheduled maintenance or overhaul or with the consent of the AEC and another one or more of such units shall at the same time be shut down by reason of conditions beyond the Company's control, the Company's obligation shall be to supply Preliminary Contract Capacity or Contract Capacity, as the case may be, less one-third of Contract Capacity for each unit in excess of one which is shut down. The AEC may schedule or take service at any rate which would not require the operation of any generating unit of the Facilities at a rate less than the equivalent of 70 Mw at the Primary Delivery Points except as may be mutually agreed to from time to time and which would not, except upon reasonable notice, result in starting up or shutting down any such unit. Reasonable notice, for the purpose of this Section, will be established by agreement among the Company, the AEC and TVA. The AEC will

not be entitled to service at a rate greater than is provided in the first sentence of this Section, but if at any time the AEC shall wish service at such greater rate, the Company will use its best efforts to furnish such service. To the extent that service at such greater rate shall be less than Preliminary Contract Capacity or Contract Capacity, whichever shall be then applicable, such service shall be furnished to the AEC at the cost to the Company of obtaining such service from the most economical outside source at the time available. To the extent that service at such greater rate shall exceed Preliminary Contract Capacity or Contract Capacity, whichever shall be then applicable, such service shall be at such just and reasonable rate or rates as may be quoted at such time by the Company.

SECTION 3.02. *Delivery Arrangements with TVA and Utilization of Power and Energy:* The AEC will arrange with TVA for the acceptance by TVA of power and energy scheduled by or for the AEC and delivered by the Company hereunder and for the delivery of such amount of power and energy by TVA to the AEC; and it is understood that all such power and energy as provided in Section 3.01 will be available to the AEC at all times up to 100% load factor and will not be for resale by the AEC except as specifically provided.

SECTION 3.03. *Supply of Reactive Power:* The Company will be obligated to supply such reactive power as is applicable to a 93% power factor of the amount of power at the time deliverable in accordance with the Company's obligation hereunder, except that at a time when the AEC has scheduled power deliveries hereunder at a rate less than the Company is then obligated to provide and as a result there is reactive capacity in any generating unit being operated which reactive capacity is in excess of that required to supply the scheduled power deliveries, and which reactive capacity it would be possible to utilize, consistent with the standard of operation referred to in the last sentence of Section 2.01, to generate additional reactive power without adversely affecting scheduled power deliveries to the AEC, the Company will at the request of the AEC supply additional reactive power from the capacity so available for such purpose. The AEC will make arrangements with TVA so that reactive power shall not be taken from the Company in excess of that which the Company has hereinbefore agreed to supply.

SECTION 3.04. *Resales to Contractors, Tenants and Concessionaires:* The AEC shall have the right at any time to resell or provide power and energy to which it is entitled hereunder to its contractors, tenants and concessionaires for their consumption at or in the vicinity of a Project.

SECTION 3.05. *Use of Power by Successors at a Project:* The AEC shall have the right to resell or dispose of any part of the power and energy to which it is entitled hereunder at any time, to any public or private successor operator of a Project or any portion thereof or to any other agency of the United States Government for consumption at the site of a Project.

SECTION 3.06. *Transfers of Power for Use at Other Government Installations;* Except as provided below in this Section, the AEC shall have the right at any time, to the extent that power and energy shall no longer be required at a Project, to transfer all or any part of the power and energy to which the AEC is entitled hereunder in blocks of not less than 7,500 Kw, to supply service for any new requirement not previously served or any new requirement in excess of that previously served by the Company or the systems of the Sponsoring Companies at a United States Government installation for consumption in operations at such installation, provided such transfer hereunder shall be lawful and shall not impair the validity of this contract. If the AEC shall desire to exercise such right, it shall give notice thereof to the Company. If the AEC shall desire to make such transfer through facilities provided by the Company or the systems of the Sponsoring Companies and if the Company and such systems agree thereto, such power and energy shall be delivered by the Company for such period as may be mutually agreed upon, to the point agreed upon at the rates provided for herein, adjusted to reflect any change in cost to the Company resulting from the method of delivery employed. If, however, within 60 days after receipt of such notice the Company shall undertake to release the AEC from liability with respect to all further charges payable by the AEC with respect to such power and energy as of (i) the later of (a) one year after such notice, or (b) the day on which such power and energy could have been used at such United States Government installation, or (ii) such earlier date, if any, when

the Company shall be able to absorb such power and energy in its system or in the systems of the Sponsoring Companies, then, in either such case, the Company shall, as of the date when the AEC is released from such liability, have the right to dispose of such power and energy in any manner it may determine.

SECTION 3.07. *Characteristics of Supply and Points of Delivery:*

1. All electric service delivered hereunder at the Primary Delivery Points shall be 3 phase, 60 cycle at a voltage of approximately 170 Kv, or such other voltage as may be mutually agreed upon from time to time. The Company will cooperate with the AEC and TVA to maintain the agreed upon voltage at the Primary Delivery Points so that it will not vary more than plus or minus 5% or such other limits as may be mutually agreed upon.

2. All electric service delivered hereunder at the Secondary Delivery Points shall be 3 phase, 60 cycle at practicable delivery voltages.

ARTICLE IV.

Rates.

SECTION 4.01. *Base Capacity Charge and Capacity Charge:* The Base Capacity Charge for the Contract Capacity hereunder shall be $9,052,050 per year, which takes into account but is not limited to interest and amortization on debt incurred in providing the Facilities and on $1,135,000 for certain transmission facilities not included in the Facilities, return on equity, fixed operation and maintenance, no-load fuel, costs with respect to federal income taxes, and all other elements of cost (except costs provided for in Sections 4.08 and 4.11), all as described or referred to in Appendix C, incurred for the purpose of putting the Company in a position to deliver the Contract Capacity hereunder. The Capacity Charge shall be the Base Capacity Charge as adjusted by the adjustments specified in Sections 4.02, 4.03 and 4.10 and shall be payable, in accordance with Article V, at the rate of one-twelfth each month.

SECTION 4.02. *Adjustment of Base Capacity Charge for Change in Cost of Facilities:* There shall be added to or subtracted from the Base Capacity Charge 50% of an amount computed at the rate of $56,050 per year for each $1,000,000 by which the sum of the cost of the Facilities plus $3,135,000 is greater or less than $107,250,000; *provided however,* additions to the Base Capacity Charge for or on account of the adjustment provided for in this paragraph shall not exceed $273,244 per year. For the purpose of this adjustment, the cost of the Facilities shall include all components of cost for organization and financing of the Company and for investigating and planning for and construction of the Facilities. The elements of cost included in the term "construction" in the last preceding sentence shall be determined in accordance with the Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (herein called the Uniform System of Accounts). Cost for purposes of this Section shall be mutually determined not later than 18 months after the commencement of commercial operation of the third generating unit included in the Facilities; *provided however,* that for the period between the commencement of commercial operation of the first generating unit and the determination of such cost, the cost of the Facilities shall be estimated as nearly as practicable, subject to retroactive adjustment upon final determination of such cost.

SECTION 4.03. *Periodic Adjustments:*

1. There shall be added to or subtracted from the portion of the Base Capacity Charge applicable to each month an amount computed at the rate of $3,500 per month for each 1¢ by which the average cost of coal delivered (unloaded) at the Facilities during the immediately preceding six-months' period ending with June 30 or December 31, as the case may be, is greater or less than 19¢ per million Btu; *provided however,* that such adjustment for the period ending with the next succeeding June 30 or December 31, as the case may be, after the commencement of commercial operation of the first unit of the Facilities shall be made after such June 30 or December 31 and shall be based upon the average cost of coal delivered (unloaded) at the Facilities prior to such date, and such average cost of coal so delivered prior to such date shall also constitute the basis for the monthly adjustment

provided for in this Section during the next succeeding six months' period. The "cost of coal delivered (unloaded) at the Facilities," as used in this Section and in Section 4.05, means the cost to the Company of the coal through the first handling thereof from the barges, cars or other conveyances of the carrier by which the coal is shipped to the Facilities, including operation and maintenance of unloading equipment and any taxes and other imposts assessed against or upon the coal, its extraction, sale, transportation or use, which the Company is required to pay.

2. On the first day of each calendar quarter, there shall be subtracted from or added to the portion of the Base Capacity Charge applicable to each month of the succeeding quarter 1/12 of the amount by which $536,250 is greater or less than the result of a calculation pursuant to the following formula:

$$\frac{ER}{100 - R}$$

In the foregoing formula:

E = Return on equity capital which is fixed at $495,000 when the cost of the Facilities, determined in accordance with Section 4.02, is exactly $104,115,000, and is increased by an amount computed at the rate of $28,025 for each $1,000,000 by which such cost of the Facilities is less than $104,115,000, or is decreased by an amount computed at the rate of $28,025 for each $1,000,000 by which such cost of the Facilities is greater than $104,115,000 and not in excess of $113,865,000, and is decreased by an amount computed at the rate of $56,050 for each $1,000,000 by which such cost of the Facilities is greater than $113,865,000 until E equals zero.

R = Estimated composite rate of applicable Federal taxes levied upon or measured by income, expressed as a percentage and determined for the succeeding quarter-yearly period by agreement.

Until determination of the cost of the Facilities as provided in Section 4.02, such cost shall be estimated as nearly as practicable by the

Company and concurred in by the AEC. In the event of changes in applicable laws making the provisions of this paragraph 2 inequitable, the parties will agree on an amendment of this provision to the end that such changes in law shall alter the effect of this provision to the minimum extent practicable.

SECTION 4.04. *Base Energy Charge and Energy Charge:* The Base Energy Charge for all energy delivered at Primary Delivery Points and Secondary Delivery Points hereunder shall be 1.863 mills per Kwh, which takes into account but is not limited to the cost of coal or other fuel for operation of the Facilities, the cost of operating labor and other operating and maintenance expenses and all other elements of costs and expenses (except costs provided for in Sections 4.08 and 4.11), all as described or referred to in Appendix C, incurred or paid in providing services hereunder except those taken into account in the Capacity Charge. The Energy Charge for all energy so delivered shall be the Base Energy Charge adjusted by the adjustments specified in Sections 4.05 and 4.06.

SECTION 4.05. *Adjustment for Cost of Coal:* The Base Energy Charge for each month shall be adjusted upward or downward by an amount computed at the rate of 1/11th mill per Kwh for each 1¢ of increase above or decrease below 19¢ per million Btu in the cost of coal delivered (unloaded) at the Facilities during the immediately preceding six-months' period ending with June 30 or December 31, as the case may be; *provided however*, that such adjustment for the period ending with the next succeeding June 30 or December 31, as the case may be, after the commencement of commercial operation of the first unit of the Facilities, shall be made after such June 30 or December 31, and shall be based upon the average cost of coal delivered (unloaded) at the Facilities prior to such date, and such average cost of coal so delivered prior to such date shall also constitute the basis for the monthly adjustment provided for in this Section during the next succeeding six-months' period.

SECTION 4.06. *Adjustment for Cost of Labor and Other Operating and Maintenance Expenses:* For each month during each six-months period beginning with January or July, there shall be added to or

subtracted from the Base Energy Charge an amount computed at the rate of 1/100th mill per Kwh for each 4¢ of increase above or decrease below $1.97 in the six-month average of Hourly Earnings of Production Workers in Gas and Electric Utility Industries, compiled by the Bureau of Labor Statistics, or compiled by any Governmental successor of said Bureau which may take over the compilation of such statistics, for the preceding six-months' period ending with September or March. Each such adjustment shall be made on the basis of the delivery of 400,000,000 kilowatt hours in each month after commencement of commercial operation of the third unit of the Facilities, and on the basis of the delivery of such proportion of 400,000,000 kilowatt hours as Preliminary Contract Capacity bears to Contract Capacity in each month prior to commencement of operation of the third unit. If the basis or method of compiling said Hourly Earnings of Production Workers in Gas and Electric Utility Industries should be changed in any way, the parties agree that this Section will be amended as may be necessary in order to preserve without alteration the effect of the adjustment herein provided for.

SECTION 4.07. *Preliminary Contract Capacity and Preliminary Capacity Charge:* Prior to commercial operation of the third unit included in the Facilities, the full Contract Capacity provided for herein shall not apply but Preliminary Contract Capacity shall apply. Preliminary Contract Capacity shall be as follows: upon commencement of commercial operation of the first unit, Preliminary Contract Capacity shall be 200,000 Kw; and upon commencement of commercial operation of the second unit and until the third unit shall commence commercial operation, Preliminary Contract Capacity shall be 400,000 Kw. During the period while Preliminary Contract Capacity is applicable, the Preliminary Capacity Charge shall be the amount which bears the same ratio to the Capacity Charge as the then applicable Preliminary Contract Capacity bears to the full Contract Capacity. Until completion of the Facilities and determination of their cost as provided in Section 4.02, Preliminary Capacity Charges shall be determined by utilizing the Base Capacity Charge, and such determinations shall be subject to adjustment upon the determination of the cost of the Facilities as provided in said Section.

SECTION 4.08. *Certain Tax Costs Other Than Federal Income Taxes:*

1. In addition to the Capacity Charge, determined as provided in Sections 4.01, 4.02, 4.03, 4.07 and 4.10, and the Energy Charge, determined as provided in Sections 4.04, 4.05 and 4.06, the AEC will pay to the Company for capacity and energy hereunder an amount equivalent to all state, local and federal taxes of every kind or character (except federal income taxes), payable by the Company or accrued during the term of this contract, including such taxes, if any, on all amounts paid to the Company under this Section, so that the amounts received by the Company for capacity and energy hereunder shall be net after all such taxes; *provided however*, that the AEC shall not be required to pay to the Company an amount equivalent to taxes at rates in effect April 10, 1954 for Social Security, such as State Unemployment, Federal Unemployment, Federal Old Age Benefits and similar taxes then applicable to payrolls, or equivalent to sales and use taxes on operating supplies and taxes and other imposts on coal, its extraction, sale, transportation or use, as provided in Sections 4.03 and 4.05, or to the extent that an amount equivalent to any taxes or imposts may hereafter be taken into account in the Capacity Charge or the Energy Charge paid by the AEC to the Company; and *provided further*, that income tax costs (other than for federal income taxes), based upon net income, included in the payments to be made by the AEC under this Section with respect to any tax year shall not exceed taxes on taxable income represented by earnings after taxes for such year of $495,000, except that, to the extent that income taxes based upon $495,000 of earnings shall not be paid with respect to any year due to the fact that the Company did not realize earnings in that amount, the difference between the tax cost payment actually made with respect to such year and the tax cost payment which would have been made with respect thereto had the Company earned $495,000 in such year, shall be available as a carry-forward in determining the maximum taxes payable in any future year or years; and *provided further*, that to the extent that the Facilities are used for purposes other than the supply of capacity and energy to or for the AEC and the Company derives income therefrom and incurs tax liabilities as a result of such use or income, and to the extent that the Company may incur tax liabilities based upon activities other than those

for or arising out of the performance of this contract or properties other than those acquired in that connection, such tax liabilities shall be discharged at the sole cost and expense of the Company. The Company will maintain records of the revenues derived from any such other use, activity or ownership, and of the incremental cost of generating the energy produced through such other use or income derived from such other activity, so that the tax liabilities arising therefrom may be determined and excluded from bills payable by the AEC.

2. (a). The Company agrees to notify the AEC of any state or local tax of any kind or character levied or purported to be levied on or collected from the Company and constituting a reimbursable item of costs under paragraph 1 above if due and payable, but which (1) in the opinion of the Company or of the AEC, as communicated to the Company, is inapplicable or invalid, or (2) is of a category as to which the AEC has notified the Company that the AEC reserves the right of approval of payment. The Company further agrees to refrain from paying any such tax, unless authorized by the AEC. Any tax paid with the approval of the AEC or on the basis of advice from the AEC that such tax is applicable and valid, and which would otherwise be a reimbursable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax was in fact inapplicable or invalid except to the extent that a refund of such tax is obtained.

(b) The Company agrees to take such action as may be required or approved by the AEC to cause any such tax referred to in (a) above to be paid under protest, and to take such actions as may be required or approved by the AEC to seek recovery of any payment made, including assignment to the Government of all rights to an abatement or refund thereof, and granting permission for the Government to join with the Company in any proceedings for the recovery thereof.

(c) The Company shall give the AEC immediate notice in writing of any action filed against the Company arising out of its compliance with the provisions of this paragraph 2 and shall furnish promptly to the AEC copies of all pertinent papers received by the Company with respect to such action. The Company, with the approval of the AEC, may settle any such action and, if requested by the AEC, shall authorize

representatives of the Government to settle or defend any such action and to represent the Company in, or to take charge of, any such action. If the settlement or defense of any such action is undertaken by the Government, the Company shall furnish all reasonable assistance in effecting a settlement or asserting a defense. If the Government does not authorize a settlement or assume the defense of such action, the Company shall proceed with the defense in good faith and, in such event, the defense of the action shall be at the expense of the AEC. If the AEC directs the Company to institute litigation to enjoin the collection of, or to recover payment of, any such tax, the Company shall proceed with the litigation in good faith as directed from time to time by the AEC, and, in such event, the AEC shall reimburse the Company for its costs and expenses incurred on account of such litigation.

(d) The Government shall save the Company harmless from penalties, interest and other expenses, costs and charges of any kind incurred by the Company through compliance with this paragraph 2.

3. In the event that any of the taxes or imposts at rates in effect at April 10, 1954, which are mentioned in the first proviso of paragraph 1 of this Section, should be reduced below such rates or should be repealed, an equitable adjustment to give effect thereto will be made in the Capacity Charge or the Energy Charge, as the case may be.

SECTION 4.09. *Adjustment in Absence of Sinking Fund Depreciation Ruling:* This contract was entered into with the intention that the amount of debt retirement would be approximately equivalent to the amount of depreciation on an annual basis and that depreciation would be allowable under a sinking fund method. If the Company should be unable to obtain from the Secretary of the Treasury or other duly authorized official a ruling, closing agreement or other agreement satisfactory to the Company permitting it to deduct depreciation for purposes of federal income taxes on the depreciable property included in the Facilities on a 31-year sinking fund formula with interest at the rate of 3½% per annum, or if such ruling, closing agreement or other agreement once obtained should be reversed, rescinded or rendered invalid or ineffective, with the result that the Company will not be able on the aforesaid basis to recover fully the undepreciated cost of the Facilities over the unexpired portion of the 31-year period, the parties

will enter into appropriate amendments or supplements to this contract to provide that the AEC shall thereafter at such intervals and during such periods of time as may be from time to time agreed upon make adjusted payments to the Company for power and energy hereunder in an amount estimated to be adequate to provide the Company with funds, together with the applicable portion of the debt money component of the Capacity Charge, sufficient to maintain the intended relationship between depreciation and debt retirement and also to permit the Company to comply with any sinking fund or analogous requirements of any instrument pursuant to which indebtedness of the Company shall have been issued or incurred as contemplated by this contract. The deduction of depreciation for Federal income tax purposes on the basis stated above constitutes a part of the basic cost structure of this contract and of the furnishing of facilities for the supply of services hereunder, and therefore the obligation of the AEC under this Section is a portion of such basic cost structure. Consequently, unless the Company shall obtain from the Secretary of the Treasury or other duly authorized official a closing agreement or other agreement satisfactory to the Company covering such sinking fund depreciation, the obligation of the AEC under this Section shall survive any cancellation or termination of this contract other than the expiration of this contract at the end of the 25-year term provided for in Section 7.01, except that the parties may agree in writing that such obligation may be modified or terminated and cancelled in connection with any cancellation or termination of this contract. If the Company shall be able and shall elect to deduct depreciation for purposes of Federal income taxes on the basis of a formula more favorable than the sinking fund depreciation formula contemplated by this Section, the parties will review the effect of such change in the formula as well as the considerations specified in Section 4.12 and will enter into appropriate amendments to this contract to make any equitable overall downward adjustment to which they may mutually agree.

Section 4.10. *Termination or Cancellation Adjustments.* Upon termination of this contract in whole or in part as provided in Section 7.02, the Capacity Charge, the amounts payable pursuant to Section 4.11, and the amount of tax costs payable under Section 4.08 which are not directly distributable as provided below, shall be reduced at the

same time or times and in the same proportion as the Contract Capacity is reduced pursuant to Section 7.02, Section 7.03 or paragraph 3 of Section 7.07. Tax costs provided for in Section 4.08 which are levied on any basis capable of direct distribution shall be allocated directly to the AEC and the Company in amounts reflecting the proper share of each.

SECTION 4.11. *Replacement Reserve:* As a part of the cost structure of this contract and for the purpose of providing for the cost of replacements to the Facilities, the AEC will make payments to the Company as provided in this Section. With respect to each of the first sixty months after the commencement of commercial operation of the first unit included in the Facilities, the AEC will pay to the Company an amount equivalent to one-twelfth of $524,000; *provided however,* that with respect to any period as to which there is in effect a ruling of the Internal Revenue Service that payments under this Section are not subject to Federal income taxes, the amount so to be paid to the Company shall be equal to one-twelfth of $262,000. Starting with the 15th day of the 60th month after the commencement of commercial operation of the first unit included in the Facilities, and on the 15th day of the last month of each calendar quarter thereafter, the Company will prepare an estimate of the cost to be incurred by the Company for replacements during the succeeding calendar quarter and will furnish a copy of such estimate to the AEC. Such cost of replacements shall consist of the sum of

(i) the estimated amount of expenditures by the Company during such quarter in respect of replacements, less estimated net salvage credits, which expenditures will be chargeable to property and plant in accordance with the Uniform System of Accounts; *provided however,* that such estimated amount of expenditures and all prior credits to the replacement reserve as hereinafter provided for shall not exceed an amount, cumulative over the term of this contract (and, if extended pursuant to Section 7.08, over the period of any such extension or extensions) equal to one-fourth of 1% annually of the cost of the Facilities, such cumulative amount to be increased or decreased, however, by the percentage by which such estimated amount of expendi-

tures and all prior charges to the replacement reserve exceeds or is less than the total original cost, at the time of installation, of all units of property previously replaced or to be replaced during such quarter; and

(ii) with respect to any period as to which there is no ruling of the Internal Revenue Service that payments under this Section are not subject to Federal income taxes, an amount equivalent to the amount derived pursuant to clause (i), less any additional estimated depreciation accruing during such quarter and applicable to replacements theretofore made by the Company and paid for out of funds derived from charges to the replacement reserve.

With respect to each month commencing with the 61st month after commencement of commercial operation of the first unit in the Facilities, the AEC shall pay to the Company 1/3rd of the amount of the cost of replacements determined pursuant to clauses (i) and (ii) with respect to the quarter in which such month occurs. The Company will maintain on its books a replacement reserve and will credit to such reserve all amounts received by it from the AEC under this Section after deducting therefrom Federal income taxes, if any, which may be payable by the Company with respect to the receipt by it of such payments after reflecting the effect of any additional depreciation referred to in clause (ii). All charges for replacements, except replacements paid for out of the proceeds of insurance or out of amounts paid to the Company by third parties, shall be charged to the replacement reserve. Any net earnings, after any applicable taxes thereon, resulting from investment of the Company's funds allocable to the replacement reserve, will be credited to such reserve. The Company will apply promptly for a ruling of the Internal Revenue Service that payments under this Section are not subject to Federal income taxes. The prior approval of the AEC shall be obtained for any replacement of a unit of property at a cost in excess of $100,000, provided that if any such replacement shall be necessary under any indenture or other agreement pursuant to which indebtedness of the Company shall have been issued or incurred in order to prevent a default thereunder, no such approval shall be required. When the aggregate amount of charges (net of

salvage) to the replacement reserve equals the adjusted cumulative amount derived pursuant to the proviso in clause (i), or at the end of the fifth year after the beginning of full-scale operation, whichever is earlier, and at intervals of three years thereafter, and at such other time or times as the parties may agree upon, the parties hereto will jointly examine and review the matter of payments under this Section and will enter into appropriate amendments of this contract in order that the Facilities shall be kept in a dependable and efficient operating condition and that the provisions of this Section shall be equitable to both parties with respect to costs incurred by the Company by reason of this Section and payments made by the AEC hereunder. Upon the expiration of this contract, either at the end of the term provided for in Section 7.01 or any extended term, or by termination or otherwise, any amount of the Company's funds in the replacement reserve shall be retained by the Company, paid to the AEC or divided between the Company and the AEC as shall be agreed by the parties to be fair and equitable in the light of prior operations hereunder and the results thereof and giving effect to accumulated replacement requirements necessary to place the Facilities in a dependable and efficient operating condition in accordance with practices prevailing among prudent operators of similar properties.

SECTION 4.12. *Refinancing by Company at Lower Interest Rate:* If in the future the Company shall refinance all or any part of its debt securities so that the aggregate interest thereafter payable by the Company on all its outstanding debt securities shall be at a rate of less than 3½% per annum thereon, the parties will review operations hereunder and the results thereof from the inception of such operations, any increase in the debt security financing costs of the Facilities over an over-all rate of 3½% per annum, and all other factors having a bearing upon the effects of this contract as compared with its anticipated effects, and the parties hereto will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

SECTION 4.13. *Effect of Adding Units to the Facilities:* If in the future and at the site of the Facilities the Company should build additional facilities or additions to the Facilities, the parties will review

the effect of such change upon the Company's cost of delivering power and energy hereunder, as well as the considerations specified in Section 4.12, and the parties hereto will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

SECTION 4.14. *Over-All Billing Adjustment:*

1. In addition to the adjustments set forth in Sections 4.02, 4.03, 4.05 and 4.06, there shall be a cumulative adjustment, the effect of which shall be to divide equally between the AEC and the Company all revenue derived from service rendered to the AEC under this contract in excess of revenue required to provide net income for Company at the rate of $495,000 per annum, increased or decreased by the same amount by which the Base Capacity Charge is decreased or increased, respectively, under Section 4.02. Such latter net income is referred to in this Section as Adjusted Net Income. To the extent that the aggregate revenue derived from operations under this contract for any twelve-month period starting with the commencement of commercial operation of the third generating unit included in the Facilities, or starting with any anniversary thereof, and for all such prior twelve-month periods, shall exceed the aggregate revenue required to provide the Company net income equivalent to Adjusted Net Income for such twelve-month period and all such prior twelve-month periods, the Company shall credit such excess revenue to a Special Reserve Account, and shall impound and deposit such excess in a Special Fund which shall not be available to the Company or the AEC except upon the making of payments therefrom pursuant to the following provisions. Any net earnings after any applicable taxes thereon, resulting from the investment of such impounded funds shall be credited to the Special Fund. Net income earned by the Company from the sale of reserve capacity or of energy produced through the use of reserve capacity or Contract Capacity not taken by the AEC, or otherwise resulting from activities of the Company other than those for or arising out of the performance of this contract, shall be separately accounted for and shall have no effect upon the determination of net income or Adjusted Net Income under this Section. To the extent that net income derived from operations under this contract for any such twelve-month

period is less than Adjusted Net Income, the Company shall charge the Special Reserve Account and shall be entitled to payment from the Special Fund of such amount as shall be necessary to make up net income for such twelve-month period for the Company equivalent to Adjusted Net Income. When and if the Special Reserve Account shall exceed $500,000 on any December 31, the AEC shall be entitled to one-half of the excess thereof over $500,000 and one-half of such excess shall become available to the Company as a part of its general funds. Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, any balance remaining in the Special Fund shall be divided equally between the Company and the AEC. By agreement between the parties the operation of the provisions of this Section may be put on a calendar year basis. For purposes of this Section net income shall be derived in accordance with the Uniform System of Accounts for Public Utilities and Licensees prescribed by the Federal Power Commission as effective January 1, 1937, and further shall be determined after setting aside in a Reserve for Deferred Maintenance any unexpended portion of the estimated maintenance expense set forth in Appendix C for the period in question. Any net earnings, after any applicable taxes thereon, resulting from the investment of funds reserved for deferred maintenance shall be credited to the Reserve for Deferred Maintenance. Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, the Company and the AEC shall agree upon the amount necessary, giving effect to accumulated maintenance requirements, to place, or to provide for placing, the Facilities in the dependable and efficient operating condition required for providing the service herein provided for during the unexpired term, including permissible extensions thereof under Section 7.08 hereof, all in accordance with practices prevailing among prudent operators of similar properties. If, after providing for such maintenance, any amount shall remain in the Reserve for Deferred Maintenance, such amount shall be equally divided between the parties.

2. In the event of partial termination as provided in Section 7.02, the amount of Adjusted Net Income and the $500,000 level for the Special Reserve Account shall be reduced in the same proportion as the Contract Capacity is reduced pursuant to Section 7.02, Section 7.03 or

paragraph 3 of Section 7.07. If at the effective date of any such reduction, there should be any amount in the Special Fund in excess of the reduced level therefor, such excess shall be divided equally between the Company and the AEC.

3. In the event that any income taxes should in the future be required to be paid on account of the receipt of any amount deposited in the Special Fund, such taxes shall be charged to the Special Reserve Account and paid out of the Special Fund, and any refunds of taxes so paid shall be credited to the Special Account and deposited in the Special Fund. Similarly, if, after payment of any such taxes out of the Special Fund, the payment or credit out of the Special Fund to the AEC of amounts with respect to which such taxes had been so paid results in a reduction of taxes otherwise payable by the Company, then an amount equal to such reduction shall be credited to the Special Account and deposited in the Special Fund and shall promptly thereafter be paid or credited to the AEC.

SECTION 4.15—*Limitation on Earnings:* In addition to the other limitations contained in other sections of this contract, it is the intention of the parties that although there is no limitation on the possible losses to the Company under this contract, the amount available to the Company as net income during the life of this contract derived from operations under this contract shall not exceed $600,000 per annum. To the extent that the aggregate amount available to the Company as net income derived from operations under this contract for any twelve-month period starting with the commencement of commercial operation of the third unit to be included in the Facilities, or starting with any anniversary thereof, and for all such prior twelve-month periods, is in excess of the maximum aggregate net income allowable to the Company under this Section the Company shall credit such excess income to a Limitation Account, and shall impound and deposit such excess in a Limitation Fund which shall not be available to the Company or the AEC except upon the making of payments therefrom pursuant to the following provisions. Funds deposited in the Limitation Fund shall be invested in securities approved by the Commission. Any net earnings, after any applicable taxes thereon, resulting from the invest-

Added by Supplement

ment of such funds, shall be deposited in the Limitation Fund. To the extent that the amount available to the Company as net income derived from operations under this contract for any such twelve-month period (or portion thereof at the expiration of this contract) is at a rate less than the maximum annual net income allowable to the Company under this Section, the Company shall charge the Limitation Account and shall be entitled to payment from the Limitation Fund of such amount as shall be necessary to make available to the Company net income for such twelve-month period (or portion thereof) at a rate equivalent to the maximum annual net income allowable to the Company under this Section. By agreement between the parties, the operation of the provisions of this Section may be put on a calendar-year basis. Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, any balance remaining in the Limitation Fund shall be paid to the AEC.

ARTICLE V.

Billing and Payment.

SECTION 5.01. *Billing:*

1. The Company shall submit to the AEC as early as practicable in each month a bill for (a) the portion of the Base Capacity Charge and the Base Energy Charge or, if available, for the portion of the Capacity Charge and the Energy Charge, for power and energy hereunder during the preceding month, and (b) the aggregate amount payable by the Company in the next succeeding month for or on account of taxes constituting the basis for payments by the AEC pursuant to Section 4.08. The Company shall also submit to the AEC as early as practicable in each month a bill or credit memorandum for any amounts due the Company or the AEC for the preceding month on account of any of the adjustments provided for in Sections 4.02, 4.03, 4.05, 4.06 and 4.08 and not included in the bill provided for in the preceding sentence; *provided however*, that the Company may render such bills or credit memoranda for any or all such adjustments on a quarterly basis or such other basis as may be mutually acceptable, and may include therein the adjustment for any item not included in a pre-

vious bill or credit memorandum. Each such bill or credit memorandum shall include such detail as the AEC may request. After the termination of this contract, whether by expiration of the term hereof or otherwise, adjustments, by payment, credit or otherwise as may be agreed upon, shall be made for all liabilities hereunder accrued up to the date of termination.

2. The Company may bill the AEC separately each month for reimbursement of the cost of replacements as provided in Section 4.11 or may include such charges as separate items in bills submitted pursuant to paragraph 1 of this Section.

SECTION 5.02. *Payment*: Bills submitted pursuant to Section 5.01 shall be paid by the AEC within fifteen days after receipt thereof. Each such bill and each credit memorandum submitted pursuant to Section 5.01, whether or not paid or otherwise taken into account, shall be subject to such subsequent corrections as may be appropriate, including corrections as a result of audits, corrections arising by reason of subsequent determination or redetermination of taxes by any taxing authority, and any other correction based upon a subsequent ascertainment or determination of data underlying the amount of such bill or credit memorandum; and any amount found to be due to either party as the result of any such correction shall be discharged by payment to such party by the other, by being taken into account in a subsequent bill or credit memorandum, or otherwise.

ARTICLE VI.

Measuring Instruments.

SECTION 6.01. *Measuring Instruments:* The Company shall own and maintain on its property the metering equipment which will be necessary to provide complete information regarding the flow of power and energy from the Company's generating station to the Primary Delivery Points as well as to others. The measurements taken on such metering equipment will be appropriately adjusted for losses in transmission between the points of measurement and the Primary Delivery Points. The AEC may, at its option and expense, install check meters. The Company will make such periodic tests and inspections of its meters

as may be necessary to maintain the same at the highest practical commercial standard of accuracy and will advise the AEC promptly of the results of any such test which shows any inaccuracy more than 1% slow or fast. The AEC shall be given notice of and may have representatives present at such tests and inspections. The Company will make additional tests of its meters at the request of the AEC and in the presence of the AEC's representatives. If such periodic or additional tests show that a meter used for billing is accurate within 1% slow or fast, no correction shall be made in the billing to the AEC; but if such tests show that such meter is inaccurate by more than 1% slow or fast, correction shall be made in the billing to the AEC for the previous month, or from the date of the latest test if within the previous month and for the elapsed period in the month during which the test was made; *provided however*, that no correction shall be made for a longer period than that during which it may be determined by mutual agreement that the inaccuracy existed. Measuring instruments of existing Secondary Delivery Points are governed by existing agreements or arrangements between TVA and others which are not affected by this contract. The Company will use its best efforts to see that arrangements for Secondary Delivery Points between subsidiaries of the Sponsoring Companies and TVA shall provide the AEC with substantially the same terms and conditions of test and billing adjustment as are provided for Primary Delivery Points by this Section.

SECTION 6.02. *Measurement of Maximum Demand:* Whenever it shall be necessary to measure or compute the maximum demand of the AEC load, such maximum demand shall be taken as the highest average simultaneous load measured in kilowatts, or otherwise as agreed, at the Primary Delivery Points and Secondary Delivery Points during any clock hour in the period under consideration.

ARTICLE VII.

Term of Agreement.

SECTION 7.01. *Duration:* The term of this contract as a contract for electric utility service shall be for a period of 25 years starting with the date of the commencement of commercial operation of the first

unit of the Facilities. Such date shall be the first day on which the first unit is in a position to deliver commercially hereunder Preliminary Contract Capacity substantially as defined in Section 4.07. The Company shall notify the AEC on this date and said 25-year term shall commence with said date the same as if it were written into this Section. The Company will similarly notify the AEC of the date of the commencement of commercial operation of each of the other units of the Facilities.

SECTION 7.02. *Termination:* After the commencement of commercial operation of the third unit of the Facilities, or 42 months after the effective date hereof, whichever is earlier, the AEC shall have the right to deliver to the Company a written notice of termination of this contract in whole or in part, and such termination shall become effective on the date three years after the date of receipt by the Company of such notice or, at the option of the AEC to be exercised by a further writing delivered to the Company within twelve months of the date of delivery of such notice of termination, such termination shall become effective on the date four years after the date of receipt by the Company of such notice of termination. The AEC shall be entitled to transfer, by assignment or otherwise, the right to take power and energy hereunder to the extent terminated, during such notice period or any balance thereof, to any other agency of the United States Government, whether for use by such agency or for resale; and if such transfer is made by assignment, such agency shall agree to pay all amounts, whether by way of Capacity Charge, Energy Charge, adjustments, tax costs, or otherwise, which would have been paid by the AEC with respect to such power and energy in the absence of such assignment; *provided however*, that no assignment shall be made unless such other Governmental agency shall have the lawful authority to accept such assignment, enter into such agreement and make such payments. If at any time during such notice period the AEC shall desire to have the Company take over on a firm basis all or any portion of the capacity hereunder affected by a notice of termination delivered as above provided, and if the Company shall agree to such taking over, the Company and the AEC will fix upon a mutually agreeable date for such taking over by the Company. When and as any such assignment shall become effective but only until the expiration of such assignment, or as capacity is so

taken over by the Company, Contract Capacity shall be reduced by an amount corresponding to the amount of capacity so assigned or taken over. In such connection, the Company shall have the right to elect, at the time when such capacity is so taken over by it, to treat the capacity so taken over, to the extent that it will suffice, as an anticipated fulfillment of the minimum obligations of the Company to absorb Contract Capacity on an annual basis under Section 7.03.

SECTION 7.03. *Contract Capacity After Termination:* In the event of a termination of this contract either as to the entire Contract Capacity or as to any portion thereof, the Company, after the effective date of the termination and subject to the provisions of Section 7.05, shall be entitled to absorb and shall absorb the Contract Capacity as to which termination shall have become effective as rapidly as the growth of its load will permit; but the Company will, in any event and regardless of the amount of Contract Capacity absorbed in any prior period, absorb at least 100,000 Kw of Contract Capacity as of the effective date of termination and 100,000 Kw of Contract Capacity as of each anniversary thereafter of the effective date of termination until the entire Contract Capacity as to which termination shall have become effective shall have been absorbed, and in the event of termination of the entire Contract Capacity, the Company shall absorb the entire amount thereof not later than the fifth anniversary of the effective date of termination. The Company will not make commercial use of unabsorbed capacity except pursuant to agreement with the AEC. The AEC may assign all or any part of any balance of such terminated Contract Capacity not absorbed by the Company to another Governmental agency, subject to the Company's right and obligation to absorb further capacity as set forth above, provided that the payments for power and energy associated with the assignment to such Governmental agency shall be at a rate giving recognition to any change in costs then encountered or foreseen by the Company and shall be subject to approval by the Federal Power Commission or such other regulatory commission as may have jurisdiction, that such agency shall have lawful authority to accept such assignment and to agree to make such payments, and that such agency shall accept such assignment and shall so agree. As capacity is so absorbed by the Company or as and when any such assignment shall become effective, Contract Capacity shall be correspondingly reduced.

SECTION 7.04. *Credit to AEC After Termination Upon Relinquishment by AEC of Capacity:* If the AEC shall deliver to the Company a statement in writing that it relinquishes its right to the Contract Capacity or any portion thereof as to which a notice of termination shall have been delivered to the Company pursuant to Section 7.02, the AEC shall receive a credit of $500,000 for each one-third of Contract Capacity (determined as provided in Section 1.04 but, without any reduction therein as provided in Sections 7.02 and 7.03 and paragraph 3 of Section 7.07) so relinquished, in computing the Annual Capacity Charge payable by the AEC; *provided however*, that if the Company shall absorb pursuant to any of the provisions hereof any portion of the capacity so relinquished, such credit shall be decreased in proportion to such absorption at the same time that the Annual Capacity Charge is reduced pursuant to Sections 4.10 and 7.02 in connection with such absorption.

SECTION 7.05. *Notice by Company Regarding Absorption of Power:* Not less than 24 months prior to the effective date of any notice of termination delivered to the Company pursuant to Section 7.02, the Company will deliver to the AEC a written statement of the amount of Contract Capacity, not less than the minimum provided for in Section 7.03, which the Company will absorb as of the beginning of the first twelve-month period following the effective date of termination. Thereafter, not less than 24 months prior to the commencement of each succeeding twelve-month period following the effective date of such termination, the Company will deliver to the AEC a similar statement in writing with respect to such period, until all terminated capacity shall be accounted for. Failure by the Company to deliver any such 24-months' notice except the last shall be tantamount to a notice by the Company that it will absorb 100,000 kilowatts of capacity as of the beginning of the twelve-month period to which such notice would have applied, and failure by the Company to deliver the last such notice shall be tantamount to a notice that it will absorb the balance of terminated capacity at the beginning of the twelve-month period to which such notice would have applied. By mutual agreement of the parties the 24 months required for notices under this Section may be shortened, and by similar agreement notices under this Section may be made to apply to periods other than the twelve-month periods specified above.

SECTION 7.06. *Reimbursement of Company for Costs and Expenses upon Termination:* On and after any termination pursuant to Section 7.02, the Company shall have the right, in addition to any other rights hereinbefore specified, to collect from the AEC, and the AEC shall be obligated to pay to the Company, cancellation costs equivalent to any fair and reasonable cancellation charges which the Company may have to pay to third persons as a result of such termination and all other costs and expenses suffered or reasonably incurred by the Company by reason of such termination. The Company will exercise every reasonable effort to reduce such cancellation charges and other costs and expenses to a minimum by, among other things, continuing contracts which the Company may have to such extent as may be consistent with the requirements of the Facilities following such termination, and making arrangements with companies in the systems of the Sponsoring Companies or with the AEC to take over such contracts where such action is practicable and may be carried out with no economic or other disadvantage.

SECTION 7.07. *Cancellation Prior to Completion:*

1. If, prior to the commencement of commercial operation of the third unit of the Facilities, the power requirements of the AEC at the Projects are so reduced that it will no longer require service hereunder, the AEC may assign to TVA the right to power and energy hereunder in accordance with the terms hereof. Acceptance of such assignment by TVA and notice thereof to the Company by the AEC shall have the effect of the delivery of a notice of termination by the AEC at the earliest date possible under Section 7.02. If the AEC advises TVA that such assignment to it is available and ascertains that TVA has concluded that it does not need the power hereunder during the period which such assignment would cover, the AEC shall be entitled to cancel this contract by delivering a written notice of cancellation to the Company, and such notice shall have the effect set forth in paragraph 2 or paragraph 3 of this Section, whichever is applicable.

2. If a notice referred to in paragraph 1 of this Section shall be delivered to the Company prior to the time when the Company shall have incurred expenditures on account of the cost of the Facilities as referred to in Section 4.02 which, together with the costs (estimated

where necessary) of cancellation of commitments made in that connection, shall equal $40,000,000, this contract shall terminate on such date after the delivery of such notice as shall be specified therein. In such event, the AEC shall pay to the Company as cancellation costs such amount or amounts that there shall be available for distribution to the Sponsoring Companies net assets, including at cost to the Company land acquired for the site of the Facilities, equivalent to the investment of the Sponsoring Companies in the equity of the Company up to the effective date of such cancellation, after payment and satisfaction of all reasonable liabilities, costs, indebtedness, cancellation or revocation costs and damages, and all other reasonable costs, expenses, charges and losses resulting from such cancellation, including carrying charges on indebtedness of the Company to the earliest practicable date for the retirement thereof after the receipt of payment by the AEC under this paragraph, together with any premium payable upon the redemption of such indebtedness; and the AEC shall be entitled to, and shall remove from the site of the Facilities at its own cost and expense and within a reasonable time, all items of personal property theretofore acquired by the Company and not returned or returnable to a vendor in connection with the cancellation or revocation of a contract or commitment and may remove from the site of the Facilities at its own cost and expense and within a reasonable time all items of property acquired by the Company which have been so attached to the land or any structure thereon as to become realty, provided any injury to the land caused by such removal shall be made good. The AEC shall have the right, in lieu of reimbursing the Company for cancellation charges or payments on any purchase contract or order, to take over such purchase contract or order upon the agreement by the AEC to assume all liabilities thereunder and hold the Company harmless therefrom. The AEC shall make payment of amounts payable hereunder from time to time and as soon as practicable to the end that the aggregate amounts payable by it hereunder shall be reduced so far as possible and the Company will undertake to cooperate with the AEC for that purpose.

3. If a notice referred to in paragraph 1 of this Section shall be delivered to the Company after the time referred to in the first sentence of paragraph 2 of this Section, such notice shall be deemed to constitute a notice of termination under Section 7.02 and termination shall become

effective pursuant thereto three years after the earliest date when a notice is deliverable pursuant to the provisions of Section 7.02, but immediately upon delivery of such notice referred to in paragraph 1 of this Section, the Company shall be obligated to start absorbing capacity as rapidly as the growth of its load will permit. To the extent it can so absorb capacity, it will agree with the AEC on the amounts and dates of such absorption, and Preliminary Contract Capacity or Contract Capacity, as the case may be, shall be reduced on such dates and in amounts corresponding to the respective amounts so absorbed. In this connection the Company shall have the right to elect, at the time of any such absorption, to treat the capacity then absorbed, to the extent that it will suffice, as an anticipated fulfillment of the minimum obligations of the Company to absorb Contract Capacity on an annual basis under Section 7.03.

SECTION 7.08. *Service After Contract Term:* If the AEC shall require electric utility service for its operations at one or more Projects after the term of this contract, and if it shall then have lawful authority to contract for such service, it shall have a first call on the capacity of the Facilities for an additional term of five years in any amount up to but not exceeding the Contract Capacity in effect at the end of such term, upon giving the Company at least three years' written notice prior to the end of such term of the amount of the AEC's requirements. The power and energy taken during such five-year period will be paid for by the AEC on the terms and at the prices provided for in this contract, adjusted to give credit and recognition to the condition of the Facilities, any change in the rate of depreciation, any changed requirements for replacements and reserve capacity, availability of such reserve capacity, interest and amortization on debt necessary to provide such service, plus a fair return on any equity capital reasonably required in order to provide such service during such extended period. If the AEC exercises the above option to purchase power for such additional term of five years, the AEC, upon like notice and under like conditions, shall have a first call for a further period of fifteen years or any part thereof on the capacity of the Facilities in any amount not exceeding the amount to which the AEC shall be entitled at the expiration of the initial five-year extension. The terms of any

agreement relating to such further period shall give effect to mutually satisfactory arrangements determined after a separate review of the factors hereinbefore described, the experience of the parties hereto during the initial five-year extension, and the reduction or elimination of interest and amortization requirements on the long-term debt of the Company.

SECTION 7.09. *Recapture:* At any time within three years after the effective date of this contract the AEC shall have the option to purchase the Facilities, including all property contracted for or acquired for inclusion therein, upon giving the Company thirty days written notice of the intention of the AEC to exercise the privilege of purchase provided for in this Section. On the last day of such thirty-day notice period or on such other date as shall be mutually agreed upon, the Company will transfer to the AEC all right, title and interest of the Company in and to all property, real, personal or mixed, included in the Facilities or contracted for or acquired for inclusion therein, and the contracts therefor, and the AEC shall assume all liabilities then outstanding of every kind or nature theretofore incurred by the Company in connection with the acquisition or construction of the Facilities, including liabilities relating to debt securities of the Company, and shall indemnify the Company against all such liabilities. The Company will segregate in separate accounts the proceeds of issuance of its debt securities, will utilize such proceeds only for expenditures made on account of the cost of the Facilities, and upon such transfer to the AEC will assign to the AEC all the right, title and interest of the Company in and to the amounts in such separate accounts. The AEC shall pay to the Company in cash an amount equivalent to the sum of (a) aggregate expenditures theretofore made on account of the cost of the Facilities as referred to in Section 4.02, including expenditures for property contracted for or acquired for inclusion in the Facilities, as of the date of transfer thereof to the AEC, (b) an amount equivalent to the unexpended balance, as of such date of transfer, of the proceeds from the issue of debt securities, including the amount of any cash on deposit with the trustee under any indenture or deed of trust of the Company, and (c) an amount equivalent to all costs and commitments incurred by the Arkansas Power & Light Company in connection with

constructing the facilities for backup supply referred to in Item IV of Appendix C hereof, including cost, if any, required for reconverting the facilities to their original condition, less any then value, salvage or otherwise, to Arkansas Power & Light Company by reason of costs and commitments incurred, in the light of the use to which such facilities in their then state of completion may be put in the absence of this contract, less (d) an amount equivalent to the principal amount of debt securities of the Company assumed by the AEC and outstanding on such date of transfer to the AEC. The amount of such cash payment shall be determined as promptly as practicable in accordance with Section 4.02 and upon such determination shall be paid to the Company by the AEC, together with interest thereon at the rate of 6% per annum from the date of transfer of the Facilities to the AEC to the date of payment. For purposes of this Section the AEC may designate any other agency of the United States Government thereunto duly authorized to accept such transfer, make such payment, assume such indebtedness and indemnify the Company.

ARTICLE VIII.

General Provisions.

SECTION 8.01. *Purchase of Fuel:* The Company shall afford the AEC the opportunity to review and discuss the price, terms and conditions of any major long-term contract proposed to be made by the Company with any supplier of coal or other fuel to be furnished to the Company for consumption at the Facilities and any major long-term contract to be made by the Company for the handling and shipment of coal or other fuel, and to make recommendations with respect to any such contract looking toward economies and dependability in the fuel supply; *provided however,* that the acquiring of an adequate, dependable and economical fuel supply shall be the responsibility of the Company. In addition, with respect to any such contract proposed to be made by the Company for a term exceeding one year, the AEC shall have the right, prior to the making of such contract, to approve the cancellation provisions thereof. If the AEC shall be in a position to purchase and deliver, or cause to be delivered, to the Facilities fuel at a cost lower than the cost to the Company for fuel of like grade

and quality so delivered, the AEC shall have the right to supply such fuel to the Company, either by sale or otherwise, on such terms as shall be mutually agreeable to the parties.

SECTION 8.02. *Use of Fuels or Sources of Energy Other than Coal:* The Company may make use of fuels or sources of energy other than coal, if available, to the extent that it is economically advantageous to do so. If the Company decides to make use of another fuel or source of energy, the parties will review the economies to be effected thereby, as well as the considerations mentioned in Section 4.12, and the parties hereto will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

SECTION 8.03. *Accounts:*

1. The Company shall keep books of account in accordance with the Uniform System of Accounts and such other systems of accounts prescribed by other Governmental regulatory authorities having jurisdiction as may be applicable, shall keep such records and memorandum accounts as may be required for the computation of amounts payable by the AEC hereunder and shall furnish such information and reports therefrom as the AEC may reasonably require. The Uniform System of Accounts shall be used for the determination of any question relative to costs and expenses arising under this contract except that where specific methods of computations of amounts are set forth in this contract such methods shall be employed in lieu of any other method which might be required by the Uniform System of Accounts.

2. The AEC shall have the right, at such reasonable times as it deems appropriate until five years after termination or expiration of this contract, to inspect all books, records, accounts and related documents involving transactions relating to this contract, including those relating to the Facilities, and to make such audits thereof as the AEC may deem necessary to protect its interests. Such books, records, accounts and all related documents will be retained by the Company in accordance with Federal Power Commission Regulations to Govern the Preservation of Records of Public Utilities and Licensees as in effect at the date hereof.

3. The Company agrees that the Comptroller General of the United States or any of his duly authorized representatives, until the expiration of three years after final payment under this contract, shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Company involving transactions related to this contract.

4. The Company further agrees to include in each subcontract hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States, the AEC or any of their duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers and records of such subcontractor involving transactions related to the subcontract. The term "subcontract" means any purchase order or agreement to perform all or any part of the work or to make or furnish any materials required for the performance of this contract, but does not include (i) purchase orders not exceeding $1,000, (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public, or (iii) subcontracts or purchase orders for general inventory items not specifically identifiable with the work under this contract.

5. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

SECTION 8.04. *Successors and Assigns:* This contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This contract, however, may not be assigned by either party without the written consent of the other, except that (a) the AEC may assign this contract without consent of the Company to any agency of the United States of America which is a successor to the AEC for purposes of operation of one or more Projects, if such successor agency is authorized to assume and does assume all the duties and obligations of the AEC hereunder, (b) the Company may assign this contract without consent of the AEC to a successor to all or substantially all the property and assets of the Company, (c) the Company may pledge this contract without consent of the AEC to secure indebtedness of the Company incurred or to be incurred for the purpose of

constructing the Facilities, and (d) in connection with the enforcement of any such pledge, this contract may be assigned or transferred without consent of the AEC to one or more persons who shall assume the obligations of the Company hereunder. Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended, the Company, without the consent of the AEC, may assign to any bank, trust company or other financing institution, including any federal lending agency, any moneys due or to become due under this contract, and any such assignment may cover all or any part of the amounts payable by the AEC to the Company hereunder and may be made to more than one such bank, trust company or financing institution either for their own respective accounts or as agent or trustee for two or more parties who are holders of evidences of indebtedness of the Company. Payments to be made to the assignee of any moneys due or to become due under this contract shall not be subject to reduction or set-off other than for amounts due the AEC or the Government under this contract.

SECTION 8.05. *Force Majeure:* The Company shall not be held responsible or liable for any loss or damage to the AEC on account of non-delivery of power or energy hereunder at any time due to any cause beyond the control of the Company, including but not limited to an act of God, fire, flood, explosion, strike, sabotage, an act of the public enemy, civil or military authority, insurrection or riot, an act of the elements, failure of equipment, or inability to obtain or ship materials or equipment because of the effect of similar causes on suppliers or carriers; *provided however*, that non-delivery on account of any such causes shall not relieve the AEC from its obligation to pay the Company any charges payable hereunder except to the extent that such charges may include payments for which the Company is compensated by insurance or otherwise or of which the Company is relieved as the result of the operation of such causes and which are not offset by losses, costs, expenses or liabilities arising from or in connection with such causes and not covered by or included in payments under this contract. The Company will exert every effort to assure the continuity of supply of the Contract Capacity, and when that amount of power is not available because of the foregoing causes, the Company will endeavor, upon request of the AEC, to secure the necessary power from others at rates as specified in Section 3.01.

SECTION 8.06. *Effect of Changes in Certain Laws or of Hostilities:* In the event that new laws or amendments to existing laws shall be enacted or new orders or amendments to existing orders shall be issued or new regulations or amendments to existing regulations shall be promulgated by governmental authorities having jurisdiction affecting wage rates, hours of work, or other conditions, or in the event of active hostilities, whether or not accompanied by a formal declaration of war, any of which shall result in increased or decreased costs hereunder, the parties hereto will enter into appropriate amendments of this contract designed to protect each party against impairment of its rights hereunder by reason of such increased or decreased costs.

SECTION 8.07. *Property Insurance:* The Company will cause its property which is of a character usually insured by companies similarly situated and operating like properties to be insured to a reasonable amount against loss or damage from such hazards or risks as are usually insured by such companies or as may be required by any mortgage or other instrument pursuant to which indebtedness of the Company shall have been issued or incurred. The proceeds of any such insurance received by the Company due to the destruction of or damage to the Facilities shall be applied to the replacement, restoration or repair thereof to the condition required to fulfill the Company's obligations under this contract. From time to time upon written request of the AEC, the Company will furnish it with a statement of such insurance outstanding and in force, including the names of insurance companies which have insured, the amounts of insurance, and the property, hazards and risks covered thereby.

SECTION 8.08. *Patents and Inventions:* The Company agrees to indemnify the Government, its officers, agents and employees against liability of any kind, including costs and expenses incurred, for the use of any invention or discovery or for the infringement of any Letters Patent (not including liability arising pursuant to 35 U. S. Code, Section 183, as amended, prior to the issuance of Letters Patent) occurring by reason of the installation or use by the Company, or the installation by the AEC for the account of the Company, of items manufactured, furnished, installed or supplied under this contract. Any liability or loss of the kind described in this Section suffered by

the Company shall not be included directly or indirectly in the determination of any charges to the AEC.

SECTION 8.09. *Interests of Others:* No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit which may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

SECTION 8.10. *Restriction on Employment:* In the performance of its obligations hereunder, the Company shall not employ any person undergoing sentence of imprisonment at hard labor.

SECTION 8.11. *Anti-Discrimination:* In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay, or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees or applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause. The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

SECTION 8.12. *Disclosure of Information:*

1. It is understood that disclosure of information relating to the work contracted for hereunder to any person not entitled to receive it, or failure to safeguard all secret, confidential and restricted matter that may come to the Company or any person under its control in connection with the work under this contract, may subject the Company, its agent, employees, and subcontractors to criminal liability under the laws of the United States. See the Atomic Energy Act of 1954.

2. In the performance of work under this contract the Company agrees to conform to all security regulations and requirements of the AEC. Except as the AEC may authorize in accordance with the Atomic Energy Act of 1954, the Company shall not permit any individual to have access to restricted data until the designated investigating agency shall have made an investigation and report to the AEC on the character, associations, and loyalty of such individual and the AEC shall have determined that permitting such person to have access to restricted data will not endanger the common defense or security. As used in this paragraph the term "designated investigating agency" means the United States Civil Service Commission or the Federal Bureau of Investigation, or both, as determined pursuant to the provisions of the Atomic Energy Act of 1954.

3. Except as approved in writing by the AEC, the Company shall insert the provisions of paragraphs 1 and 2 of this Section in all subcontracts, agreements with its employees, agreements for borrowed personnel, and the contract or contracts with the Sponsoring Companies referred to in Section 2.02.

SECTION 8.13. *Eight-Hour Law:* This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (Title 40 U. S. Code, Sections 324-326), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended and to all other provisions and exceptions of said law.

No laborer or mechanic doing any part of the work contemplated by this contract in the employ of the Company or any subcontractor contracting for any part of said work, shall be required or permitted to work more than 8 hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Section. The wages of every laborer and mechanic employed by the Company or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of 8 hours per day and work in excess of 8 hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of 8 hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of

this Section, a penalty of $5 shall be imposed upon the Company for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work without receiving compensation computed in accordance with this Section, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

SECTION 8.14. *Selection of Employees:* The Company shall make every reasonable effort in the selection of its employees to secure persons who are competent, careful, honest and loyal to the United States of America.

SECTION 8.15. *Regulatory Approvals and Indebtedness:* The obligations of the parties hereunder shall be subject to the following:

(1) the receipt of all regulatory approvals, in form and substance satisfactory to the Company, necessary to permit the Company to perform all the duties and obligations to be performed by it hereunder or necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to issue the indebtedness referred to herein;

(2) the execution and performance by institutional investors and banks of contracts or commitments, in form and substance satisfactory to the Company, providing for the issuance by the Company and the purchase by such investors and banks of the indebtedness referred to in the recitals of this contract;

(3) the receipt by the Company of an opinion of the General Counsel to the AEC to the effect that the AEC has power and authority to execute this contract and the undertakings herein described and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the persons executing and delivering this contract on behalf of the AEC have full power and authority to do so; and

(4) the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC

has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress.

SECTION 8.16. *Representation and Warranty and Agreements of the Company:*

1. The Company represents and warrants that, subject to the approval of regulatory authorities having jurisdiction, it has entered into a valid and binding contract with the Sponsoring Companies wherein the Sponsoring Companies have agreed to subscribe to and purchase for cash capital stock of the Company as follows: Middle South Utilities, Inc. $4,345,000; The Southern Company $1,155,000.

2. The Company agrees that it will not modify or change the contract or contracts referred to in Section 2.02 so as to alter the effect thereof as described in that Section, and will not modify, change or rescind the stock subscription agreement referred to in paragraph 1 of this Section.

3. The Company will not request accelerated amortization of the Facilities for income tax purposes, of the character provided by the Defense Production Act of 1950, as amended, unless it has obtained the written consent of the AEC and the parties have entered into an appropriate amendment to this contract to make an equitable adjustment of the provisions hereof.

SECTION 8.17. *Effect of Invalidity of any Provisions Hereof:* If any of the provisions of this contract, or any part of any provision hereof, shall be held to be illegal for any reason, the other provisions hereof, and the other parts of the provision containing such illegal part, shall not be affected thereby, and shall continue in all respects valid and enforcible. In such event the parties will make such amendments hereto, as may be mutually agreed upon, to the end that the objectives of this contract shall be accomplished as nearly as practicable in a lawful manner. If the provision or part thereof so held to be illegal

shall be one providing for any payment, or any component of any payment, by the AEC to the Company or be one by which any such payment, or any component thereof, is determined and the parties shall fail within three months after such holding (or such longer or shorter period on which the parties shall agree) to agree to amendments to this contract which shall have the effect of restoring the Company, in a lawful and practicable manner, to substantially the earnings position the Company would have had except for such illegality, then the Company shall have the right, to be exercised by written notice delivered to the AEC within one year following the end of the period for amendment determined as above provided, to elect, effective as of a date to be specified in the notice, which date shall be not less than one month following the date of such notice, to cancel and make ineffective thereafter all the provisions of Article IV of this contract but to continue to furnish capacity and energy to the AEC as herein provided at such just and reasonable rates, which shall contain both a capacity charge and an energy charge, as may be from time to time fixed or approved by the Federal Power Commission acting in a regulatory capacity under the standards provided by the Federal Power Act, or by such other regulatory commission as shall have jurisdiction; and thereupon the AEC, from and after the date when payments cease to be made in accordance with the provisions of this contract, shall be obligated to take and pay for capacity and energy furnished hereunder at not less than the rates so fixed or approved. Prior to such effective date, the Company will file with such commission a schedule of the capacity charge and the energy charge the Company proposes for the capacity and energy supplied hereunder. Pending the initial date of approval or determination by such commission of the rates so to be payable hereunder, the AEC, effective as of the time when payments ceased under this contract and monthly thereafter, shall pay to the Company in accordance with the capacity charge and energy charge proposed by the Company, subject to appropriate adjustment by refund or additional payment, as the case may be, after the determination or approval by such commission of the just and reasonable rates to be payable to the Company. Until such determination or approval, the Company shall retain, and impound in a separate fund, the payments so received by the Company except to the extent necessary for its operations and for the current payment of its liabilities and obligations,

including amortization of debt. Any action by such commission for the purposes of this provision shall be subject to the same rules and rights as to review in the courts as are applicable by law to other proceedings before such commission. If the AEC shall, after such a cancellation of the provisions of Article IV hereof as hereinabove provided, terminate this contract in whole or part pursuant to the provisions of Section 7.02 or 7.07, then the capacity charge in the rates fixed or approved as herein provided shall be taken as the Capacity Charge to be paid or reduced under the provisions of Sections 7.02 and 7.03.

SECTION 8.18. *Covenant Against Contingent Fees:* The Company warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Company for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

SECTION 8.19. *Notices:* All notices under this contract shall be in writing, and if to the Company, shall be sufficient in all respects if delivered in person to its President or Vice President, or sent by registered mail addressed to it at P. O. Box 1376, West Memphis, Arkansas, or at any subsequent address of which the Company may notify the AEC in writing; and if to the AEC, shall be sufficient in all respects if delivered in person to Manager, Oak Ridge Operations, Atomic Energy Commission, or sent by registered mail addressed to the AEC at P. O. Box E, Oak Ridge, Tennessee, or any subsequent address of which the AEC may notify the Company in writing.

SECTION 8.20. *Titles of Articles and Sections:* The titles of the Articles and Sections in this contract have been inserted as a matter of convenience of reference and are not a part of this contract.

SECTION 8.21. *This Writing Constitutes the Agreement:* This contract constitutes the entire agreement between the parties and supersedes all prior communications or statements of the parties, whether written or oral, with respect to agreement as to the subject matter hereof.

SECTION 8.22. *Effective Date:* The effective date of this contract shall be the latest of the following: (a) the date when this contract is executed and delivered by the parties hereto; (b) the date when item (3) of Section 8.15 shall be delivered to the Company; (c) the date when item (4) of Section 8.15 shall be delivered to the Company; or (d) the date on which the time shall have elapsed during which the contract must remain on file with the Joint Committee on Atomic Energy pursuant to Section 164 of the Atomic Energy Act of 1954 or the date when said Joint Committee shall have waived such requirement as provided in said Section.

Modified
Supplème

SECTION 8.23. *Arbitration:* In the event the parties hereto are unable to reach an agreement as to any matter which it is contemplated shall be settled by agreement, negotiation or amendment between the parties under Sections 1.04, 3.01, 4.02, 4.03, 4.06, 4.09, 4.11, 4.12, 4.13, 4.14, 4.15, 7.08, 7.09, 8.02 or 8.06 hereof, then the determination of such matter shall be made by arbitrators appointed as hereinafter provided. If with respect to any such matter the parties shall have failed to reach an agreement within a period of three months after the date when such matter first arose for determination, or within such longer or shorter period as the parties hereto may agree, then either party may by written notice to the other appoint an arbitrator to act hereunder with respect to the determination of such matter. Within fifteen days from receipt of such notice of appointment of an arbitrator the other party shall appoint an arbitrator and give written notice of such appointment to the first party. The arbitrators so appointed shall within a period of forty-five days after the date of appointment of the second arbitrator agree upon the appointment of a third arbitrator who shall be a person engaged in engineering work or business relating to the production or transmission of electric power

and energy. Should the arbitrators appointed by the parties be unable to agree upon the selection of a third arbitrator, or should there for any other reason be a failure to appoint three arbitrators as contemplated by this Section, either party may apply to any federal court which would have jurisdiction of an action between the parties arising out of this contract for the appointment of an arbitrator or arbitrators, pursuant to Section 5 of the Federal Arbitration Act (Title 9 U. S. Code, Section 5). The compensation and expenses of the arbitrators in connection with the performance of their duties hereunder shall be paid in equal proportions by each of the parties hereto unless the arbitrators otherwise specify in their decision. Promptly after the selection of the third arbitrator, as above provided, the arbitrators shall proceed, in accordance with such procedure as they may fix, to hear and determine the matter for the determination of which they have been appointed. The arbitrators shall thereupon and as promptly as feasible, determine such matter by a written decision, a copy of which is to be delivered to each of the parties hereto, to be made in accordance with any applicable standards relating to such matter contained herein and to include a finding that such decision is consistent with the provisions hereof and, in any case where such decision is to be made the basis of an amendment to the contract, findings that such decision is desirable in the business of the Company and the AEC, is not prejudicial to the interests of the holders of the outstanding indebtedness of the Company and will not impair any security therefor. The decision of two or more of the arbitrators shall be final and binding upon the parties hereto. If under the provisions hereof the matter so determined by a decision of the arbitrators requires an amendment or amendments hereto, the parties agree to incorporate such decision in an appropriate amendment or amendments hereto, in such form and manner as the arbitrators shall designate if the same cannot be agreed upon by the parties hereto, and to execute an appropriate instrument setting forth such amendment or amendments. Either party may at any time apply to an appropriate court for entry of judgment upon a final award of the arbitrators. If at any time or with respect to any matter the provisions of this Section shall be unenforceable for any reason as to either of the parties hereto and

the parties shall not at such time comply with the provisions of this Section, then they shall take such other action as may be at the time mutually agreed upon to secure a determination of the unsettled matter.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

MISSISSIPPI VALLEY GENERATING COMPANY,

[SEAL]

By E. H. DIXON
President

Attest:

H. F. SANDERS,
Secretary

THE UNITED STATES OF AMERICA,
By and Through the Atomic Energy Commission,

By R. W. COOK

R. W. COOK,
Acting Assistant General Manager
for Manufacturing

Attest:

APPROVED

K. D. NICHOLS

K. D. NICHOLS,
General Manager,
Atomic Energy Commission.

November 11, 1954.

APPENDIX A.

Description of Properties.

A. GENERAL.

Mississippi Valley Generating Company is acquiring a site in Crittenden County, Arkansas, and will construct thereon a steam-electric generating station and a transmission substation (these two facilities being hereinafter sometimes referred to as the "Mississippi River Steam Electric Station").

Mississippi Valley Generating Company proposes to acquire rights-of-way in Arkansas and to construct thereon transmission lines from the Mississippi River Steam Electric Station to terminal points at the middle of the Mississippi River in the Memphis area, for the purpose of delivering electric energy to the Tennessee Valley Authority for the Atomic Energy Commission as provided in the accompanying contract.

The location of the Mississippi River Steam Electric Station is shown on the map which is part of this Appendix A. A supplemental map will be issued when transmission details are settled.

B. STEAM-ELECTRIC GENERATING STATION.

1. *General Features.*

The steam-electric station constituting the production element of this project will be of the outdoor type, located on the site referred to above on the west bank of the Mississippi River approximately two miles south of West Memphis, Arkansas.

General facilities to be provided will be those necessary for the development of the new site, comprising: site improvements, including protective levee; roadways; railroad trackage for delivery of equipment and material; dock facilities for unloading coal from river barges; coal and ash handling facilities; fire protection system; service-water installation; sanitary facilities; administration building, warehouses, equipment repair shop and other miscellaneous buildings.

2. *Arrangement and Structures.*

Three turbine-generators will be placed on an open deck at approximately elevation 245 (referred to mean sea level), served by one 60-ton

overhead gantry crane. Boiler equipment will be located upstream or north of the turbines, main operating floor being at approximately elevation 245. Grade is at approximately elevation 212. Top of stack will be at an approximate elevation of 462.

There will be provided, on the operating-floor level between boiler Units No. 1 and No. 2, an enclosed control room, air-conditioned and acoustically treated. In this room will be located all operating controls for the three turbine-generating units, the three steam generating units and their accessories, and complete controls for all transmission facilities.

The intake for circulating water for the three condensers will be at the river bank, with the water pumped therefrom to the station through concrete pressure pipe. Discharge seal well is located south of the intake structure with water carried to it from the condenser discharge through concrete pressure pipe.

3. *Equipment.*

Each of the three turbine-generators will be capable of a maximum continuous gross output of approximately 234,000 kw with throttle steam conditions of 2,000 pounds per square inch gage pressure and 1,050 degrees Fahrenheit primary superheat temperature and reheat to 1,000 degrees Fahrenheit, at a back pressure of approximately 3 inches of mercury absolute with seven stages of extraction for feedwater heating and nominal makeup. Generators wound for 18 or ... kv will have a maximum continuous nameplate rating of 310,000 kva, 0.77 power factor, short circuit ratio of approximately 0.58 at maximum coolant pressure. Each unit will be served by a separate motor-driven exciter.

River-water temperature varies between a minimum near 45 F and a maximum of approximately 90 F which will give a usual range of condenser back pressures of from less than 1 inch to approximately 3 inches. Expected gross maximum generation of each plant unit at generator voltage is expected to be 234,000 kw with approximately three inches back pressure. Allowing for station uses and transformer losses, the net capability which can be continuously generated is expected to be approximately 650,000 kw, under conditions in which all normally operated equipment is in service, equipment is in an average state of maintenance and cleanliness, with the fuel consumed being ...

the average quality purchased, with normal steam conditions and normal interstage extraction from the turbines, with generators operating with usual coolant pressure and at normal voltage and power factor and with circulating water temperature and cleanliness normal for midsummer.

The surface condenser serving each turbine will have about 110,000 square feet of surface, being of the two-pass divided water-box type. Circulating water for each condenser will be supplied by two pumps at intake.

Steam generating plant will consist of three units, each of which is designed to deliver continuously about 1,550,000 pounds per hour of steam when fired with 10,000-Btu-per-lb. coal, carrying 15 per cent moisture and 15 per cent ash as received. Each steam generating unit will be equipped with necessary coal preparation and burning equipment. Each steam generating unit will be provided with dust collecting apparatus.

The mechanical and electrical auxiliaries and accessories will be those normal for the plant and with tolerances adequate to assure the net capability of the plant.

C. Substation.

Each generating unit will be connected to a 161 kv (nominal) switchyard through a bank of step-up transformers. One three-phase unit auxiliary transformer will be tapped off each generator main lead circuit to furnish power for the unit boiler, turbine and plant auxiliaries. A starting transformer shall be provided.

Also connected to the switchyard will be the transmission lines to the Primary Delivery Points and to the system of Arkansas Power & Light Company.

D. Transmission Lines.

The exact number and location of 161 kv (nominal) lines to the middle of the Mississippi River and necessary line terminal positions, circuit breakers, system relay protection, communications and telemetering and control equipment, will be determined by mutual agreement among the AEC, the Company and TVA.

APPENDIX B.

Delivery Points and Method of Energy Accounting.

I. PRIMARY DELIVERY POINTS.

The Facilities of Company will be electrically connected to the TVA system at the middle of the Mississippi River near Memphis, Tennessee. These connections will consist of circuits of sufficient capacity to deliver the Contract Capacity over and above present capacity of present river crossings, with the exact number and location of the Primary Delivery Points to be mutually agreed upon by the AEC, the Company, and TVA. Even though substantially all the Contract Capacity and scheduled energy flows between the Company and AEC will flow over such Primary Delivery Points, it will be necessary to take into account such minor amounts of power flow that may occur over other indirect routes.

There will be sufficient transmission capacity between the systems of the Sponsoring Companies and the Company to permit the delivery by the Company of the Contract Capacity at the Primary Delivery Points with one unit out of service; however, in actual operation some of the power flow may be over other indirect routes.

II. SECONDARY DELIVERY POINTS.

Secondary Delivery Points will be those points of connection to the TVA system, now established or established at any future time during which deliveries under this contract are made, which complete an electrical path between the Facilities of Company and the TVA system other than through the Primary Delivery Points.

The Facilities of the Company are to be connected to the transmission system of Arkansas Power & Light Company, a subsidiary of Middle South Utilities, Inc. The transmission system of Arkansas Power & Light Company is connected to the transmission systems of Louisiana Power & Light Company and Mississippi Power & Light Company, both of which are also subsidiaries of Middle South Utilities, Inc.

The transmission systems of Louisiana Power & Light Company and Mississippi Power & Light Company are or may be connected to the transmission system of Mississippi Power Company, a subsidiary of The Southern Company.

The transmission system of Mississippi Power Company is connected, directly or indirectly, to the transmission systems of Alabama Power Company, Georgia Power Company and Gulf Power Company, all of which are subsidiaries of The Southern Company.

The transmission systems of Mississippi Power & Light Company, Alabama Power Company and Georgia Power Company are connected to the transmission system of TVA by major transmission lines at seven points. Each of these points is a Secondary Delivery Point under this contract.

Furthermore, the transmission systems of subsidiaries of The Southern Company are or may be connected directly or indirectly with the transmission systems of other utilities in the southeastern part of the United States which in turn are or may be interconnected directly or through other systems with the TVA system. Also the transmission system of Arkansas Power & Light Company is or may be connected with other transmission systems which in turn are or may be connected directly or through other systems with the TVA system.

All such points of connection to the transmission system of TVA from adjacent interconnected transmission systems, which can complete a parallel connection with the Facilities of Company, are Secondary Delivery Points under this agreement.

III. Method of Accounting for Energy Deliveries and Billing Therefor.

Methods of operation and accounting for interchange transactions along the lines outlined below are used in a number of areas in the United States where there are power pools or interconnected groups of electric utility systems with multiple interconnections. The principles are being used for transactions between TVA, Middle South and Southern Company systems. Such a method of operation and accounting is necessary because it is impractical to attempt to control the flow of power over individual interconnections in such networks. The method which shall be used for accounting for energy deliveries under this contract is expected to be approximately as outlined below but shall be agreed upon in detail among the Company, the AEC and TVA.

1. AEC will schedule its requirements from Company within the contract limits, on an hour by hour basis. Such schedules

will be submitted, as may be mutually agreed upon, from a week to a month in advance. In the event that unusual conditions cause AEC to wish to change the schedule quickly, AEC may instruct the Company by telephone to change the schedule, within the limits of the contract and within the operating limitations of the generating equipment.

2. Middle South and Southern Company system operators will, upon receipt of the AEC schedule, schedule the amounts of power hour by hour that the Middle South and Southern Company systems will deliver or receive to or from the Company. From the three schedules, a schedule of net generation for the Company is to be made and that schedule, with whatever emergency amendments may be required, is the obligation of the Company. Energy billed between the Company and all parties contracting with it is to be based on the final schedules.

3. Each individual system of the interconnected group has telemetering equipment which gives its dispatchers information on the net flow into or out of such system. As each such system has an hour by hour schedule of its transactions with the outside systems, it is able to prepare a net schedule of flow into or out of its system for comparison with the telemetered readings of actual flow. It is then the obligation of each such system to adjust its own generation to hold the net actual flow equal to the net scheduled amount each hour as closely as practicable. Any deviation between a system's net scheduled interchange and net actual interchange is compensated for by an adjustment to its generation in the next succeeding hour, in order to minimize the cumulative deviation.

4. The meters at each point of interconnection are read periodically and a balance sheet drawn up for each system for the period. The balance sheet shows definitely whether or not each system received or delivered the amount of energy scheduled and which systems are responsible for any deviations from the total obligations for such period. Any

such deviations appearing on the balance sheet for the period are corrected during the following period by compensating adjustments to generation. All energy information is recorded on log sheets hour by hour and is available for analysis and rectification of deliveries or billings, if proper, at any subsequent date.

5. Where two or more operating utilities are interconnected and operated as one integrated system, the reference to "party," "system," or "systems" herein applies to such integrated system and not to the individual companies.

APPENDIX C

I. Components of Cost Included in Base Capacity Charge—Section 4.01

A. *Cost of Money:*			
1. Debt (30-year Level-Payment Sinking Fund Bonds—3½% Interest)	$101,750,000 x 5.437%	$5,532,000	
2. Equity	$ 5,500,000 x 9%	495,000	
3. Total	$107,250,000		$6,027,000
B. *Replacement Payments:*			
1. For facilities to be constructed by associated company	$ 1,135,000 x 0.25%		2,800
C. *Operating Expenses* (excludes variable component of Maintenance included in energy charge—Section 4.04):			
1. Operating Labor		700,000	
2. Maintenance and Miscellaneous (excludes variable component of Maintenance)		600,000	
3. No Load Fuel		800,000	
4. Transmission Operation and Maintenance		40,000	
5. Power Department Expense		20,000	
6. Insurance ($104,790,000 x 0.168%)		176,000	
7. Administrative and General		150,000	
8. Total			2,486,000
D. *Federal Income Tax Cost—52% Rate:*			
$495,000 ÷ .48 = $1,031,250 — $495,000			536,250
E. Total			$9,052,050

II. Components of Cost Included in Base Energy Charge—Section 4.04

A. *Cost of Fuel (unloaded) Component:*	
9,017 Btu per kwh @ 19¢ per mBtu fuel	1.713 mills
Variable maintenance and operating supplies (includes labor and material) component per kwh	.150
Total	1.863 mills

III. Reserve for Deferred Maintenance will be determined on the following basis:

The Reserve shall be credited each month with $50,000 plus 0.15 mills per kwh for all energy generated by the Facilities and shall be charged with maintenance and miscellaneous expenses of the nature included in Accounts 704, 705, 706, 707, 708 and 709 of the Uniform System of Accounts referred to in this Section.

IV. Payment to Arkansas Power & Light Company for $1,135,000 investment in facilities for back-up supply:

$1,135,000 x	5.437% =	$ 61,710
1,135,000 x	.168% =	1,906
1,135,000 x	.25 % =	2,838
Total		$ 66,454

The foregoing represents cost of money (included in debt money component in I A 1 above), insurance (included in I C 6 above), and replacement payment (included in I B 1 above) components, respectively.

V. Adjustment of Base Capacity Charge—Section 4.02

The amount of the adjustment to the Base Capacity for changes in the cost of Facilities sh in Section 4.02 was determined as follows:

Amount for each $1,000,000			
$1,000,000	x 5.437%	=	$ 54,370
1,000,000	x .168%	=	1,680
Total			$ 56,050
50% applicable to AEC			$ 28,025
Maximum adjustment			
$9,750,000	x 2.8025%	=	$273,244

VI. Amounts of Capital referred to in Section 4.03-2

In the formula in Section 4.03-2, certain capital figures are referred to in "E". They w determined as follows:

A. $104,115,000:

Total Capital	$107,250,000
Less: Amount to be spent by associate Company	1,135,000
Working Capital	2,000,000
Remainder	$104,115,000

B. $113,865,000

$104,115,000 + $9,750,000* = $113,865,000

* Representing the difference between the ceiling capital of $117,000,000 and the b.~ capital of $107,250,000.

November 11, 1954

Atomic Energy Commission
1901 Constitution Avenue
Washington, D. C.

Attention: R. W. Cook

Re: *Memorandum Re Power Contract dated November 11, 1954 between AEC and Mississippi Valley Generating Company Contract AT-(49-1)-814.*

Gentlemen:

We are enclosing herewith a copy of the interpretative memorandum which we worked out with the staff of your Commission in connection with the negotiation of the above-mentioned contract which has just been executed and delivered. This memorandum is our understanding of the effect to be given to certain provisions of the contract.

Will you kindly confirm that it is similarly your understanding by signing and returning to the undersigned a copy of this letter?

Sincerely yours,

E. H. Dixon
E. H. Dixon, President
Mississippi Valley Generating Company

Confirmed by AEC

R. W. Cook
R. W. Cook, Acting Assistant General Manager for Manufacturing, Atomic Energy Commission

November 11, 1954

MEMORANDUM *RE* POWER CONTRACT DATED NOVEMBER 11, 1954 BETWEEN AEC AND MISSISSIPPI VALLEY GENERATING COMPANY.

During the course of negotiations of the contract between Mississippi Valley Generating Company and the United States of America, acting by and through the Atomic Energy Commission, dated November 11, 1954, Contract No. AT-(49-1)-814 the following interpretative understandings of various provisions of the contract were developed in conversations between the parties.

For convenience, the following paragraphs are keyed to the contract provision to which they principally relate.

SECTION 2.02. The Company is to furnish AEC with copies of all agreements contemplated by Section 2.02 and paragraph 1 of Section 8.16 and with copies of any amendments or modifications to any such agreements. The Company is also to furnish AEC with copies of all contracts and commitments, and amendments or modifications thereto, entered into between the Company and the institutional investors and banks, or representatives thereof, in connection with the financing of the Company's capital investment, including any bond indenture, mortgage or other evidence of indebtedness issued in connection therewith.

The term "incremental cost" which appears at the end of this Section means: "All of the costs and expenses associated with and experienced by the actual production and delivery of the product, electrical energy, over and above all of the costs and expenses which would have been incurred had there been no such actual production and delivery." This definition is also applicable to the use of the term "incremental cost" in the last sentence of paragraph 1 of Section 4.08. The parties will from time to time agree upon procedures for determining incremental cost.

SECTION 2.03. The cooperation of the parties contemplated by this Section will include the preparation of such operating memoranda or manuals through collaboration of AEC, Company and TVA as may be mutually agreed to be necessary in order to establish operating pro-

cedures for the guidance of operating personnel in the several organizations concerned with the carrying out of the provisions of the Contract.

SECTION 2.06. The Company is not to retain any firm as architect-engineers for the design of the Facilities or as general contractor for the construction of the Facilities or for the management of such construction without the prior approval of the AEC. In order to permit AEC to be fully informed as to certain matters subject to AEC review under this Section, the information to be furnished to AEC by the Company will include substantially the following information: within 6 months after the effective date of the Contract, the Company will submit an estimate of construction costs, detailed by labor and material, which will include the man-hours for each item and the wage rates on which the estimate is based. This estimate will be broken down, as far as practicable, into the units of property prescribed by the Federal Power Commission in its Order No. 45, dated January 13, 1937, and the unit cost estimate will then be summarized into the Primary Plant Accounts 301 through 393 of the Uniform System of Accounts insofar as they are applicable. The above details are not expected to include indirect or overhead charges which will be shown separately under the categories listed in the Uniform System of Accounts, Instruction 5, Electric Plant Account, Items (4) to (18), inclusive. Sufficient information will be submitted with the estimate to determine the size and capacity of the major items in each plant account. As soon as practicable after the effective date of the Contract, but in no event more than 30 months thereafter, the Company will submit for the first year of full scale operations, an estimated income statement showing operating revenue under this Contract and operating revenue deductions (Accounts 502, Operating Expenses; 503, Depreciation; 507, Taxes; 530, Interest; 531, Amortization of Debt Discount and Expense; and 536, Interest Charged to Construction—Credit). Account 502 should be detailed by the Primary Accounts 701 through 869 as applicable. Details of the estimated taxes will be shown by class of tax, and the interest, charges and debt expense will be shown separately for each class of debt or obligation issued. Amounts in Account 536 should indicate the portion of the credit arising from equity capital, bonds, notes, etc., and commitment fees.

During the period when paragraph 2 of Section 7.07 would be effective in the event of cancellation, the Monthly Progress and Cost

Reports required to be furnished to AEC under the last sentence of this Section are to include a statement of expenditures made and estimated cost of cancellation of commitments which AEC would be required to pay in the event of cancellation under the provisions of that paragraph.

SECTION 3.01. The provisions of this Section are not intended to apply to any power and energy becoming available to the Company during periods of test operation of any unit prior to the commencement of commercial operation of such unit. It is understood that if such power and energy does become available during test operation, and if Company and AEC then agree that such power and energy shall be furnished to and taken by AEC, the arrangements therefor will be covered by a separate agreement between the parties.

When the Company obtains service from the Sponsoring Companies or their subsidiaries in order to provide the additional service referred to in the second last sentence of this Section, it is understood that the "cost to the Company" of obtaining such service is to be the cost incurred by the Sponsoring Company or subsidiary thereof plus transmission losses plus a load[illegible] factor of approximately one mill per Kwh.

The second sentence of this Section provides: "The AEC may schedule or take service at any rate which would not require the operation of any generating unit of the Facilities at a rate less than the equivalent of 70 Mw at the Primary Delivery Points *except as may be mutually agreed to from time to time* and which would not, *except upon reasonable notice*, result in starting up or shutting down any such unit."

The Company has submitted two separate memoranda, dated September 14 and September 16, attached to this memorandum, covering the expected operation of the boiler and generating units from minimum load to increased load and the requirements for starting, loading and shutting down unit overnight. It was agreed, rather than attempting to spell out at this time permanently fixed limits both as to minimum loading and notice of shut-down, to incorporate the above italicized phrases in the Contract with the intention that these operating conditions can later be provided for in contemplated agreements among AEC, TVA and the Company and be modified from time to time as actual in-service experience is obtained.

SECTION 4.01. The term "no load fuel" used in this Section means "the quantities of fuel that are required to keep the turbo-generators operating at rated speed with steam pressures and temperatures maintained at proper levels and carrying no load other than that equivalent to the station auxiliaries in service, all as required to permit the production of externally useable power and energy upon notice and demand by the customer."

SECTION 4.02. It is understood that the cost of the Facilities, as defined in the second sentence of this Section, shall not include any travel or similar expenses incurred by or salary paid to any officer or employee of Middle South Utilities, Inc. or The Southern Company in the preparation and presentation of the proposals made by the Company to AEC or in the negotiation of the Contract. The foregoing statement is not intended to create any implication as to the allowability or non-allowability of any other item of cost.

In computing the Interest during Construction component of the cost of the Facilities the rate of return on equity capital is not to exceed 6%.

SECTION 4.03. In the definition of the factor "R" used in the formula in paragraph 2 of this Section, it is understood that the term "composite rate" will mean that the estimated rate will take into consideration the fact that, under current Federal income tax rates, surtax is not paid on income up to $25,000 and the fact that in future years there may be varying rates or bases of tax at various levels of income.

In the formula used in paragraph 2, the "R" factor is defined as the "estimated composite rate of applicable Federal taxes levied upon or measured by income, expressed as a percentage and determined for the succeeding quarter yearly period by agreement." In the determination of the estimated composite rate the income before taxes will be assumed to be that amount, which after estimated taxes, would yield the return on equity capital equal to the "E" factor in the formula.

SECTION 4.09. If the provisions of the second sentence of this Section become applicable, it is understood that the amendment or supplement to the Contract contemplated in this sentence will include a provision that, should the AEC make additional payments thereunder,

such payments, after providing for any applicable taxes, will be used currently to retire bonds and to pay any required premium for such retirement.

SECTION 4.10. This Section provides that, upon termination of the contract, the amounts payable on account of replacements under Section 4.11 shall be reduced in the same proportion as the Contract Capacity is reduced. One of the components of the credit provided for AEC under Section 7.04 in the event of its relinquishment of terminated capacity is $250,000, representing an estimated annual replacement payment. Accordingly, if the AEC relinquishes the total Contract Capacity after notice of termination and receives a credit therefor pursuant to Section 7.04, the parties will review the effect of Section 4.11 to determine what adjustment, if any, should be made in the payments by the AEC under that section as contemplated by the next to the last sentence thereof in order to insure that the amounts thereafter paid by the AEC under Section 4.11 will be equal to the amount in respect to replacements included in the credit received by the AEC under Section 7.04 and that the AEC will not thereafter make any net payment in respect of replacements. In the event of a partial relinquishment of Contract Capacity pursuant to which a credit is given to the AEC under Section 7.04, there will be a pro rata application of the foregoing adjustment. Such review of the effect of Section 4.11 will include consideration of the timing of the distribution of the replacement reserve contemplated by the last sentence of that Section.

SECTION 4.11. The parties will establish a line of demarcation between those items of equipment, the appropriate replacement of which will constitute a proper charge against the replacement reserve established under this section, and those items, the replacement of which is a proper charge to maintenance expense. In establishing this line of demarcation, it is intended that applicable instructions in the Uniform System of Accounts and applicable orders of the Federal Power Commission with respect to differentiation between maintenance and replacements will be followed. The parties intend from time to time to review and make such revision of this line of demarcation as may be necessary and agreed to be appropriate.

This Section contains the following provisions: "The Company will maintain on its books a replacement reserve and will credit to such reserve all amounts received by it from the AEC under this Section after deducting therefrom Federal income taxes, if any, which may be payable by the Company with respect to the receipt by it of such payments after reflecting the effect of any additional depreciation referred to in clause (ii). All charges for replacements, except replacements paid for out of the proceeds of insurance or out of amounts paid to the Company by third parties, shall be charged to the replacement reserve. Any net earnings, after any applicable taxes thereon, resulting from investment of the Company's funds allocable to the replacement reserve, will be credited to such reserve." It is understood that funds credited to the reserve account are not to be used as working capital by the Company, the need for such working capital having been provided for by initial financing; but, after retaining a reasonable cash balance to meet current requirements, if any, for which the reserve was established, such funds may be invested in such securities as AEC approves and the net income from such investments, after any applicable taxes on such income, are to be credited to the replacement reserve. If the Company shall receive a tax refund because of any payment made to the AEC pursuant to the last sentence of Section 4.11, such refund shall be deemed to be a part of the replacement reserve for the purposes of that sentence.

The principles stated in the preceding paragraph apply equally to the Reserve for Deferred Maintenance established under the provisions of Section 4.14 and to any distribution thereof under the last sentence of paragraph 1 of Section 4.14.

In the event the AEC delivers a notice of termination of the Contract and requests a joint examination and review of the matter of payments under Section 4.11 as provided therein, the Company will be agreeable to an immediate review with respect to the payments under Section 4.11 thereafter.

SECTION 4.14. The third sentence of paragraph 1 of this Section requires that the Company credit excess revenues to a Special Reserve Account and impound and deposit such excess in a Special Fund "which shall not be available to the Company or the AEC except upon the making of payments therefrom pursuant to the following provisions." The

following sentence provides: "Any net earnings, after any applicable taxes thereon, resulting from the investment of such impounded funds shall be credited to the Special Fund." It is intended that the Company may invest monies deposited in the Special Fund in such securities as the AEC approves; but that the Special Fund is not to be available to the Company or the AEC for any other purpose except for the making of payments therefrom as provided in this Section.

The 10th sentence of paragraph 1 of this Section 4.14 provides: "For purposes of this Section net income shall be derived in accordance with the Uniform System of Accounts," etc. It is understood that, in the determination of net income, the cost of power and energy received from sources other than the Company's generating facilities, and delivered to AEC as a part of its contract entitlement under Section 3.01, is to be taken to be the product of the number of kilowatt-hours of energy so received and delivered during the period for which the determination of net income is made multiplied by the Contract Energy Charge, and plus 0.15 mills per Kwh as the agreed-upon applicable no-load fuel component of power cost.

The last two sentences of paragraph 1 of Section 4.14 provide as follows: "Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, the Company and the AEC shall agree upon the amount necessary, giving effect to accumulated maintenance requirements, to place, or to provide for placing, the Facilities in the dependable and efficient operating condition required for providing the service herein provided for during the unexpired term, including permissible extensions thereof under Section 7.08 hereof, all in accordance with practices prevailing among prudent operators of similar properties. If, after providing for such maintenance, any amount shall remain in the Reserve for Deferred Maintenance such amount shall be equally divided between the parties."

In making the above determination, the parties will follow these principles:

1. The Facilities will be adequately maintained on a current basis. Consequently consideration will be given principally to accrued current maintenance and to major maintenance and repair operations recurring in accordance with established company standards in cycles of more than one year.

2. The estimated cost will not include any duplication of any maintenance or repair operation.

3. As to any item having a normal maintenance cycle longer than one year, under normal conditions only that portion of the estimated cost of the next normal maintenance operation will be included which represents the relation of the expired part of the normal maintenance cycle, as of the date of expiration, to the total normal maintenance cycle; e.g., if an item of equipment normally undergoes a maintenance or repair operation every tenth year and the contract expires at the end of the third year, there will be included under normal conditions only 3/10 of the estimated cost of the next maintenance or repair operation.

4. The cost of modernizing any portion of the Facilities will not be included to the extent chargeable to plant account under the Uniform System of Accounts.

5. The cost of any replacements customarily made in Section 4.11 will not be included.

Within twelve months after the Facilities are placed in operation, the Company will furnish AEC with a list of the items of plant, the maintenance of which are on a cyclic period of more than one year, and the estimated cyclic period applicable to such item, and will revise such list from time to time as experience indicates.

SECTION 7.04. The following are sample calculations of the effect of absorption by the Company of capacity that AEC has previously relinquished under the provisions of this Section (figures are rounded out for simplicity).

"A" Capacity Charge—600 MW		$9,000,000
Credit for relinquishment 600 MW	(—)	1,500,000
Adjusted Capacity Charge—600 MW		7,500,000
Company absorbs 250 MW	(—)	3,750,000
		3,750,000
Decrease Credit $\frac{250}{600}$ x $1,500,000	(+)	625,000
Capacity Charge—350 MW		$4,375,000

"B"	Capacity Charge—600 MW		9,000,000
	Credit for relinquishment 600 MW	(—)	1,500,000
	Adjusted Capacity Charge—600 MW		7,500,000
	Company absorbs 100 MW	(—)	1,500,000
			6,000,000
	Decrease Credit 1/6 x $1,500,000	(+)	250,000
	Capacity Charge—500 MW		$6,250,000
"C"	Capacity Charge—600 MW		$9,000,000
	Credit for relinquishment 600 MW	(—)	1,500,000
	Adjusted Capacity Charge—600 MW		7,500,000
	Company absorbs 300 MW	(—)	4,500,000
			3,000,000
	Decrease Credit ½ x $1,500,000	(+)	750,000
	Capacity Charge—300 MW		$3,750,000

SECTION 7.07. The term "losses resulting from such cancellation", used in Line 16 of paragraph 2 of this Section does not include any loss of anticipated profits.

SECTION 8.23. The decision of the arbitrators, in any case where such decision is to be made on the basis of an amendment to the contract, is required to include findings that such decision is "desirable in the business of the Company and the AEC, is not prejudicial to the interests of the holders of the outstanding indebtedness of the Company and will not impair any security therefor." The following statement will clarify the intent of the quoted language:

The Contract will be pledged under the mortgage and as a result the Company will no longer be free to consent to amendments to it without complying with the standards which are in the mortgage to the effect that the amendment is desirable in the business of the Company, is not prejudicial to the interests of the holders of the bonds and will not impair the security therefor. Similar provisions are general under mortgages under which contracts are pledged as security. The pur-

pose of the quoted provision is to enable the Company to comply with these anticipated requirements of the mortgage.

Some of the sections listed in 8.23 provide for an over-all downward adjustment under certain conditions. The Company is of the opinion that under such sections, if arbitration becomes necessary because the parties fail to agree there will be no difficulty in making the above referred to findings so as to be able to make the modifications necessary for such "over-all downward adjustments" and at the same time comply with the requirements of the mortgage, since it will be desirable in the business of the Company and in their relationship with the AEC to make the adjustments provided for if they are not prejudicial to the holders of the bonds and will not impair the security therefor. Section 8.02—Use of Fuels or Sources of Energy Other Than Coal—is an example. The same principles are considered to be applicable to all matters subject to arbitration under this Section.

SECTIONS 2.04 AND 8.02. The Company has no present intention of converting to any fuel or source of energy other than coal under the provisions of Section 8.02. In the event that in the future such conversion should become economically advantageous and it should be decided to effect such conversion, it is understood that Section 2.04 would not be applicable with reference to priority assistance but that Section 2.04 is applicable solely to the original Facilities referred to in Section 1.01.

Ebasco Services Incorporated
New York, 14 September 1954

MISSISSIPPI VALLEY GENERATING COMPANY
MINIMUM LOAD

Restudy of minimum-contract load shows that the presently stated 35% of delivery per unit at river center line, equivalent to 70 mw, be retained as an absolute minimum. This figure is considered to be the present practical lower limit of operation recommended by equipment manufacturer and experienced in central station operation with large modern generating units. It is based on all burners in operations.

The minimum output of the generating plant is fixed by the requirements of the steam generating unit and its firing equipment. The requirement for continuous commercial operation at minimum load is that the slag in the furnace bottom be in liquid state to permit ash removal by tapping. Operation at less than the recommended minimum load results in decreased temperature in the furnace bottom and causes the liquid ash to become more viscous, accompanied by solidification in the cooler sections of the furnace bottom. The extent of decreased fluidity and rapidity of ash solidification depend on variable coal properties, inherent characteristics of the furnace and the degree to which judicious manual operation of cyclone burners may tend to equalize furnace bottom temperatures. Only actual in-service experience can establish the practical commercial low limit of continuous output for a given installation.

To ensure plant response to varying demand, all essential auxiliaries, including all cyclone furnaces, must be in operation at the minimum continuous commercial output to enable automatic plant controls to pick up load. The manufacturer of the steam generating unit equipment estimates that with all cyclone burners in operation (six per boiler unit) the minimum stable output with satisfactory and continuous slag tapping may be approximately 33% to 40% of maximum boiler rating. The 70 mw (35%) suggested minimum contract load is equivalent to 31.5% of boiler rating.

Discussion by Mr. P. E. Gourdon, Consulting Mechanical Engineer of Ebasco Services Incorporated with Mr. S. Fiala, Consulting Mechanical Engineer of American Gas & Electric Company, concerning stable minimum load operating conditions of AG&E's various 200 mw units has developed the information that their liquid slag tap bottom type of furnaces can be operated at not much less than 50% rating. They feel this is a practical lower limit which can be achieved under normal routine operating conditions. Reduction below this level; down to one third or 40% rating as anticipated by the boiler manufacturer, may be possible but only under controlled test set-up conditions according to Mr. Fiala. Experience shows that AG&E units can be operated over a weekend or over a night shift at somewhat less than 50% output, resulting in accumulation of furnace bottom ash which must be melted in resuming higher load.

It may be of general interest to report the following comments from Mr. Fiala in respect to their new Kanawha plant which consists of two 217 mw units with boilers of dry bottom type. With all burners in service, the lower limit of stable operation has been found to be about 65% of full load, based on good coal conditions. By removing burners progressively, Mr. Fiala states, 40% loading can be reached, but this they consider to be the absolute minimum load. In general, AG&E consider that the practical minimum load that can be carried by dry bottom furnaces is 50% of rated capacity, and slightly less than 50% for slag tap type.

Taking all things into consideration, also in view of manufacturer's statements in regard to their equipment and central station experience in operation of large coal burning plants, it is recommended that the 35% minimum load point presently stated in the contract should not be reduced.

P. E. Gourdon

Ebasco Services Incorporated
New York, N. Y.
16 September, 1954

MISSISSIPPI VALLEY GENERATING COMPANY
PLANT STARTUP AND LOADING, ETC.

A separate memorandum dated 14 September 1954 discusses the basis for the 35 per cent minimum load point (per unit) presently stated in the draft contract. That memorandum covered practical operating considerations relative to the steam generating unit and the need for keeping all cyclone burners in operation down to this minimum load point to permit continuous slag tapping and to enable the unit to be controlled automatically between the mimimum load point and full load.

This memorandum summarizes reasonable operating time requirements for starting, loading and shutting unit overnight. The time factors shown on the attached schedule are best estimates based on preliminary boiler data and industry recognized boiler-turbine operating considerations. These time estimates are subject to review after final equipment design and operating factors are crystallized with the manufacturers. In any event, actual in-service experience will be the final guide in determining the essential time requirements. During emergencies or abnormal situations, however, it may be necessary to operate under time allowances greater or less than those estimated herein.

System disturbances which can result in loss of loads and trip-outs are considered as occurrences which must be met by proper operating practices and procedures.

This study discusses cold and hot-condition startups, loading to minimum contract load and to full load; reducing load; and considerations in connection with overnight shutdown.

The 35 per cent load point (equivalent to about 70 mw delivered at river centerline) shown in the attached schedule is the minimum to which each unit may be loaded as presently specified in the draft contract; at this load all cyclone furnaces are in operation. As load is reduced below 35 per cent, cyclone burners are removed manually from

service in step with load requirements. Furnace bottom temperatures will then decrease resulting in a more viscous slag with some freezing in the cooler areas, and after a prolonged period of operation at these lower loads continuous slag tapping will be impossible. The length of time at which commercial operation at loads somewhat below 35 per cent may be maintained can only be determined by actual operating experience. As an illustration, the boiler manufacturer states that operation with only one cyclone burner in service (equivalent to 15-mw load) may be possible for a period equivalent to a weekend; however, furnace-bottom slag would accumulate and solidify in the interim. Following such slag accumulation it would be necessary to operate at high load approximately 48 hours in order to melt the slag and restore operation on a continuous slag-tap basis. The foregoing operations to be carried out with due regard to safety considerations.

The 60 per cent load point referred to on the time schedule is significant in the loading regimen because it is the estimated load above which main steam and reheat steam temperatures are substantially constant.

It must be recognized that irrespective of time intervals mentioned herein, system conditions will influence what can be done, how slow, how fast, rate of loading, rate of unloading, etc.

Comments appropriate to the attached time schedule are summarized below:

Starting and Loading

Time interval for start from cold condition of boiler and turbine is governed by several factors of which consideration of permissible rate of drum metal temperature change is one of the major—generally recommended not to exceed 80 to 100 F per hour. Temperature change from assumed ambient condition of 50 F to approximately 650 F, (corresponding to saturation temperature in the boiler drum at full-load pressure) represents a 600 F total temperature rise. This operation requires at least 7 hours of starting time under manufacturer's normal recommendations. Some work has recently been done by a few utilities on development of techniques for rapid and controlled boiler-turbine startup which requires additional instrumentation and close supervision by the operators. Since these techniques are still new and can

only be established for each installation by actual test, our present study, and contemplated operation, is predicated on the normal practices of the industry.

The turbine can be brought on the line from cold condition during the latter phases of boiler startup, requiring no extra time beyond the 7 hours mentioned for the steam generating unit.

Time interval necessary to start the turbine from a hot condition is predicated on the boiler being "bottled up" from the previous night's shutdown and the turbine metal temperatures having dropped to a given level as determined by the previous night trip-off load-point. Turbine manufacturers' usual time recommendations are followed in bringing the unit to 10 per cent load from turning gear condition. The time required for progressive loading to 100 per cent is also governed by manufacturers' time-temperature relations which should be maintained for trouble-free operation. The estimated temperature changes tabulated on the attached schedule are predicated on preliminary boiler data, which shows 800 F main steam temperature at 10 per cent load, 950 F at 35 per cent load, and 1050 F at loads above 60 per cent.

In summary, the elapsed time necessary to reach 35 per cent load from cold start is estimated to be at least 7 hours; from hot start it requires about 7 minutes. Elapsed time from cold start to 100 per cent load is about 7 hours 20 min and from hot start approximately 90 minutes.

Unloading and Overnight Shutdown

Decreasing the boiler load to 35 per cent is readily handled by automatic combustion (and other) controls responding to turbine unloading. The turbine is unloaded in accordance with turbine manufacturer's time-temperature recommendations which are practically the same as for load pickup.

Based on preliminary boiler superheater data for this installation, a unit scheduled for overnight shutdown should be tripped at about 25 percent load to provide desirable turbine startup temperature conditions the following morning. The main steam temperature at the 25 per cent load point is about 900 F and assuming a 200 F turbine temperature drop during the night, the high-pressure turbine section will be at about 700 F temperature the following morning. The

"bottled up" boiler will lose approximately 300-500 psi drum pressure overnight, corresponding to about 620 F residual drum temperature the following morning. During turbine startup saturated steam leaving the boiler drum and passing through the superheater at the time of venting will pick up some superheat as the boiler is being fired with the result that the temperature of the steam entering the turbine will closely approach turbine metal temperature.

The elapsed time required to drop from full load to 25 per cent load is estimated to be 20 minutes. Reducing the load to tripoff or 25 per cent load requires an additional 10 minutes or a total elapsed unloading time of 30 minutes from full load to tripoff.

A. E. Giannos

JEG:amp

ESTIMATED TIME SCHEDULE

	Equipment Governing	Estimated Temp Change	Time
STARTING AND LOADING			
1A Start from cold condition and load to 35%	Steam Generator	600F in drum	7 hr (minimum)
(Note—Turbine start-up and loading will be concurrent with boiler.)			
1B Start from hot condition following an overnight shutdown and load to 35%			
a. From turning gear to synchronous	Turbine	—	30 min
b. From no load to 10% rated load	Turbine	—	Immed
c. Hold at 10% load (to stabilize exhaust hood temperature)	Turbine	—	20 min
d. Load from 10% to 35%	Turbine	150F at throttle	20 min avg.*
Subtotal for 1B (a) through (d)			70 min.
2 Load from 35% to 60%	Turbine	100F at throttle	15 min avg.*
3 Load from 60% to 100%	Mainly Combustion Controls	0F at throttle	5 min avg.*
4 Elapsed Time—from cold start			
a. To 35% load	—	—	7 hr
b. To 100% load	—	—	7 hr—20 min
5 Elapsed Time—from hot start			
a. To 35% load	—	—	70 min
b. To 100% load	—	—	90 min
UNLOADING AND OVERNIGHT SHUTDOWN			
1 Unload from 100% to 60%	Mainly Combustion Controls	0F at throttle	5 min avg.*
2 Unload from 60% to 35%	Turbine	100% at throttle	15 min avg.*
3 Unload from 35% to 25% to reduce turbine metal temperature before tripoff	Turbine	50F at throttle	10 min avg.*
4 Tripoff at 25% load and place on turning gear overnight		—	—
5 Elapsed time—from 100% load			
a. To 35% load	—	—	20 min
b. To Tripoff at 25% load	—	—	30 min

* Provided system can absorb load at the rate implied—such a transferring load from one plant to another.

Washington, D. C.
November 11, 1954

Re: **Contract No. AT-(49-1)-814 dated November 11, 1954 and Supplement No. 1 thereto, dated November 11, 1954, between Mississippi Valley Generating Company and the United States of America acting by and through the Atomic Energy Commission.**

Atomic Energy Commission
Washington, D. C.

Attention: *K. D. Nichols, General Manager, and R. W. Cook, Acting Assistant General Manager for Manufacturing*

Dear Sirs:

The Contract and Supplement referred to above (hereafter collectively called "the Contract") are being executed and delivered today on the understanding and condition that if, by February 15, 1955, the effective date of the Contract shall not have occurred as provided in Section 8.22 thereof, and valid regulatory approvals in form and substance satisfactory to the Company shall not have been obtained which are necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to permit them to purchase and pay for such shares, either party to the Contract may thereafter terminate it by written notice without liability of either party to the other.

It is our understanding that this letter has been presented to the Atomic Energy Commission, together with the Contract, and that the execution and delivery of the Contract on the basis herein set forth has been authorized by the Commission.

Will you please confirm the foregoing by signing in the place indicated below and returning to the undersigned the enclosed copy of this letter.

Very truly yours,

Mississippi Valley Generating Company

By: E. H. Dixon
President

The understandings and condition expressed in the foregoing letter are hereby confirmed:

United States of America, by and through the Atomic Energy Commission.

By: R. W. Cook
Acting Assistant General Manager for Manufacturing.

Approved: K. D. Nichols
General Manager.

Washington, D. C.
November 11, 1954

Re: **Contract No. AT-(49-1)-814 dated November 11, 1954, between Mississippi Valley Generating Company and the United States of America acting by and through the Atomic Energy Commission.**

ATOMIC ENERGY COMMISSION
Washington, D. C.

Attention: *K. D. Nichols, General Manager, and R. W. Cook, Acting Assistant General Manager for Manufacturing*

Dear Sirs:

On April 10, 1954, when the proposal was made on the basis of which the contract referred to above has been negotiated, it was expected that if the proposal was accepted as a basis for negotiation and resulted in a contract, such contract would become effective within a reasonable time. The proposal was based upon financial and economic conditions as they existed in April, 1954.

Contrary to such expectations of last April, seven months have elapsed, the contract is not yet effective, and the Sponsoring Companies are still not authorized by regulatory order to invest funds in the Company and the Company is not in a position to make firm commitments for debt financing, land, equipment or materials. The proposal was submitted with the understanding that there was an urgent need for power at the earliest date and the estimated cost of Facilities on which the rate structure is based envisioned early completion of negotiations and initiation of construction so the necessary foundation work and other appurtenant structures could be completed during low water conditions on the Mississippi River. Since the proposal was submitted the Engineering News Record Cost Index of construction costs for labor and material have increased. Past experience for the last eight years indicates that this rise will continue. In fact, since March 1954 through October 1954 the Engineering News Record Construction Index has risen approximately 4.4%.

In order to place the Company in a position to proceed promptly with its work under the contract to meet the power requirements the contract is designed to meet, the Sponsoring Companies have taken options on land, have done certain exploratory and preliminary engineering work and have taken options on important items of equipment. In addition, during the past seven months executive officers and senior employees of both Sponsoring Companies as well as counsel to both such companies have been required to spend substantial amounts of time in connection with the proposal, the negotiation of a contract and related matters.

As long as the contract may become effective, the Company must keep in a position to perform. As long as the position of the Company under the contract remains uncertain this drain on the time of executives and these expenses will continue. In view of the limited prospects for profit in the contract, the companies cannot continue this course indefinitely.

Accordingly, we are executing and delivering the Power Contract on the understanding and condition expressed in the accompanying letter agreement.

Very truly yours,

MISSISSIPPI VALLEY GENERATING COMPANY

By: E. H. DIXON
President

November 11, 1954

U. S. Atomic Energy Commission
Washington, D. C.

This Letter Contract will confirm understandings reached between Middle South Utilities, Inc. and the Southern Company (hereinafter referred to as the "Sponsoring Companies") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") relative to the furnishing of power to the Commission upon the contingencies and subject to the terms and conditions hereinafter set forth.

1. In either of the following events, and for the periods therein stated, namely:

(a) In the event that the term of the Power Contract, dated November 11, 1954, between the Commission and Mississippi Valley Generating Company (hereinafter referred to as the "Power Contract") as a contract for electric utility service shall not have commenced on or prior to the last day of the 36th calendar month commencing after the effective date of the Power Contract, then during the period commencing with the first day of the next succeeding calendar month and terminating on the date that the term of the Power Contract as a contract for electric utility service shall commence, or on the termination of the Power Contract for any cause, whichever event shall first occur, or

(b) In the event that the Company is not in a position, on or before the last day of the second calendar month commencing after the date of commencement of the Power Contract as a contract for electric utility service, to deliver commercially under the Power Contract substantially 400,000 kw, then during the period commencing with the first day of the next succeeding calendar month and terminating on the date on which the Company is in a position to deliver commercially under the Power Contract substantially 400,000 kw, or on the termination of the Power Contract for any cause,

the Sponsoring Companies, or subsidiaries thereof, will be obligated to supply, severally and separately and in the proportions

of 80% for the Middle South System and 20% for the Southern Company System, and the Commission will be obligated to pay for, 100,000 kilowatts of firm capacity (hereinafter called "Interim Power").

2. The monthly capacity charge for Interim Power shall be $1.50 per kw. The rate for energy delivered in connection with Interim Power shall be 1.863 mills per kilowatt-hour. The Commission shall pay in addition any increased cost incurred by the Sponsoring Companies or their subsidiaries on account of the delivery of power and energy hereunder due to any increased state and local taxes, and the Commission shall receive a credit for any decreased costs due to any decreased state and local taxes, in either event resulting from tax legislation having initial effectiveness subsequent to August 4, 1954, to the extent that any such tax is based on gross revenue, energy generated or sold, or on any other basis capable of direct distribution.

3. In either event described in Paragraph 1 above, the Commission and the Sponsoring Companies, or subsidiaries thereof, will enter into a formal contract for the supply of Interim Power (hereinafter referred to as the "Interim Power Contract"). Such contract will include, in addition to the provisions described in Paragraphs 1 and 2 above, the following terms and conditions:

(a) Delivery points shall be those described as Primary and Secondary Delivery Points in the Power Contract.

(b) Delivery arrangements and conditions of supply and use shall be similar to those described in Sections 3.02, 3.03, 3.04, 3.05 and 3.07 of the Power Contract, to the extent that the same are applicable.

(c) Billing and metering arrangements shall be similar to those described in Articles V and VI of the Power Contract, to the extent that the same are applicable.

(d) If the term of the Interim Power Contract shall extend for a period in excess of six months, the Commission shall thereafter have the right to terminate the Interim Power Contract upon 60 days prior written notice to the Sponsoring Companies and all rights and obligations of the parties under the Interim

Power Contract shall cease upon the date stated in such notice except as to any amount owed by any party under the Interim Power Contract on that date.

(e) The Interim Power Contract will include, to the extent applicable, provisions similar to Sections 8.03, 8.05, 8.08, 8.09, 8.10, 8.11, 8.12, 8.13 and 8.18 of the Power Contract and any other provisions required by law to be included in contracts of the Commission.

(f) The Interim Power Contract shall be subject to the availability of appropriated funds and shall also contain such other terms and conditions as shall be mutually agreeable to the parties.

4. This agreement and the Interim Power Contract are subject to present and future valid laws and to requirements of duly constituted regulatory authorities having jurisdiction.

If the foregoing states satisfactorily our understandings, will you kindly indicate your concurrence below.

MIDDLE SOUTH UTILITIES, INC.,

By E. H. DIXON

E. H. DIXON, President

THE SOUTHERN COMPANY,

By J. M. BARRY

J. M. BARRY, *Chairman of the Executive Committee*

Accepted:

U. S. ATOMIC ENERGY COMMISSION,

By R. W. COOK

R. W. COOK
Acting Assistant General Manager
for Manufacturing

November 11, 1954

November 11, 1954.

U. S. Atomic Energy Commission,
Washington, D. C.

Attention: K. D. Nichols,
General Manager.

Gentlemen:

Referring to the provisions relating to absorption contained in Article VII of the Power Contract between you and Mississippi Valley Generating Company dated November 11, 1954, as amended by supplemental agreement dated the same day, each of us agree that, in the event of termination of such Power Contract under the provisions of that Article, it and its subsidiaries will give you, and your representatives such access, as you may reasonably request and require, to data in its or their possession relevant to a determination of how rapidly the growth of load will permit absorptions of Contract Capacity under the provisions of said Article.

Sincerely yours,

MIDDLE SOUTH UTILITIES, INC.

By: E. H. DIXON
E. H. Dixon,
President

THE SOUTHERN COMPANY

By: J. M. BARRY
J. M. Barry,
Chairman of the Executive Committee

MISSISSIPPI VALLEY GENERATING COMPANY

November 24, 1954

Mr. R. W. Cook, Assistant General
Manager for Manufacturing
Atomic Energy Commission
Washington, D. C.

Dear Mr. Cook:

Your letter of November 23, 1954, regarding the meaning of Section 4.14 of Contract No. AT-(49-4)-814 of November 11, 1954, between Mississippi Valley Generating Company and the Atomic Energy Commission, has been referred to me in Mr. Dixon's absence. I have discussed your letter over the telephone with Mr. Dixon and have also taken it up with other representatives of Mississippi Valley Generating Company who were present at the meetings when the contract was negotiated.

This letter will confirm to you that your recollection of our conversations and mutual understandings regarding the interpretation of Section 4.14, as set forth in your letter to Mr. Dixon of November 23, 1954, is correct.

Sincerely yours,

PAUL O. CANADAY

PAUL O. CANADAY
Vice President

POC:fd

From the Offices of the
Joint Committee on Atomic Energy

November 13, 1954
FOR IMMEDIATE RELEASE

The Joint Committee on Atomic Energy, meeting in executive session, today adopted the following resolution by a vote of ten to eight;

"RESOLUTION

"Whereas, the Joint Committee on Atomic Energy is vested with certain duties and authorities by virtue of the provisions of the Atomic Energy Act of 1954, and

"Whereas, Section 164 of the Atomic Energy Act of 1954 requires that certain contracts for electric utility services entered into by the Atomic Energy Commission be submitted to the Joint Committee on Atomic Energy and a period of thirty days elapse while Congress is in session before the contract shall become effective, and

"Whereas, Section 164 of the Atomic Energy Act of 1954 further authorizes the Joint Committee at any time after the receipt of the proposed contract to waive the conditions of or all or any portion of such thirty day period, and

"Whereas, the Atomic Energy Commission has submitted a signed contract between the Atomic Energy Commission and the Mississippi Valley Generating Company to the Joint Committee by letter of transmittal dated November 11, 1954, as follows:

UNITED STATES ATOMIC ENERGY COMMISSION

Washington 25, D. C.

November 11, 1954

Dear Mr. Cole:

In response to your request at the opening of the hearings after recess at 2:00 P. M., November 6, 1954, we are transmitting to you herewith for filing with the Joint Committee on Atomic Energy, pursuant to Section 164 of the Atomic Energy Act of 1954, Contract No. AT-(49-1)-814 dated November 11, 1954 together with Supplement No. 1 thereto of the same date, which have been entered into today by and between the Mississippi Valley Generating Company and the United States of America acting by and through the Atomic Energy Commission, together with the following related documents:

1. Letter dated November 11, 1954 from Mississippi Valley Generating Company to the Atomic Energy Commission, confirmed by the latter, regarding execution and delivery of the power contract.
2. Letter dated November 11, 1954 from the Mississippi Valley Generating Company to the Atomic Energy Commission outlining the reasons for the above letter.
3. Interpretative Memorandum re power contract dated November 11, 1954.
4. Letter Contract No. AT-(49-1)-815 dated November 11, 1954 between the Atomic Energy Commission and the Middle South Utilities, Inc. and The Southern Company with reference to certain interim power in the amount of 100,000 kilowatts.
5. A copy of the opinion of the General Counsel of the Atomic Energy Commission required under Section 8.15(3) of the Contract.

Sincerely yours,

/S/ Lewis L. Strauss
Chairman

Honorable W. Sterling Cole
Chairman, Joint Committee
on Atomic Energy
Congress of the United States

"Whereas, the Atomic Energy Commission has requested in writing that the Joint Committee waive the conditions of the thirty day period specified in Section 164 of the Atomic Energy Act of 1954, and

"Whereas, the Joint Committee has held extended hearings on the proposed contract pursuant to which many changes were made therein which adequately protect the interest of the United States;

"Now, therefore, be it resolved that the Joint Committee on Atomic Energy, pursuant to Section 164 of the Atomic Energy Act of 1954 do hereby waive the conditions of and all of the thirty day period specified in Section 164.

October 5, 1954

B-120188

Honorable Lewis L. Strauss, Chairman
Atomic Energy Commission
Washington 25, D. C.

Dear Mr. Chairman:

I have your letter of September 24, 1954, transmitting a copy of a power contract proposed to be entered into between the Atomic Energy Commission and the Mississippi Valley Generating Company, a company organized by Middle South Utilities, Inc., and The Southern Company.

The contract provides that it shall not be effective until the happening of certain events, one of which is the receipt by the contractor of an opinion of the Comptroller General of the United States,

> "* * * to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress."

You state that the Atomic Energy Commission is of the opinion that it has power and authority to execute the contract and to perform all the obligations thereby imposed upon it, including the making of all payments required under any provisions of the contract. However, because of the above-quoted contract provision, you request my views.

The contract in question, known as the Dixon-Yates contract, calls for the construction by the Mississippi Valley Generating Company of a steam electric generating station of approximately 650,000 kilowatts capacity near West Memphis, Arkansas, of which 600,000 kilowatts will be available for a 25-year period to the Tennessee Valley Authority for the account of the Atomic Energy Commission in replacement of power furnished by the TVA to the AEC. The power considered as being replaced is understood to be a part of that which will be furnished by the TVA to the AEC installation at Paducah. The power to be furnished under the Dixon-Yates contract will be delivered to and distributed by the TVA for use in the Memphis area.

At the time the Atomic Energy Act of 1954 was under consideration by the Congress negotiations for the Dixon-Yates contract had already been undertaken by the Atomic Energy Commission, and a question arose whether the authority of the Commission under section 12 (d) of the Atomic Energy Act of 1946, as amended (section 164 of the 1954 act), was broad enough to cover such an arrangement. In order to resolve any doubt on this point Senator Ferguson offered an amendment to the section, the purpose of which was specifically stated to be to authorize the Dixon-Yates contract. Cong. Record,

July 19, 1954, p. 10430. The Ferguson amendment was adopted (Cong. Rec., July 21, 1954, pp. 10770-71), and became a part of section 164. As amended, section 164 now reads in pertinent part as follows:

"Sec. 164. Electric Utility Contracts. The Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission, without regard to section 3679 of the Revised Statutes, as amended, to enter into new contracts or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years, and such contracts shall be subject to termination by the Commission upon payment of cancellation costs as provided in such contracts, and any appropriation presently or hereafter made available to the Commission shall be available for the payment of such cancellation costs. * * * The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof. * * *"

In my opinion the foregoing language of section 164 and its legislative history authorizes the AEC to execute the Dixon-Yates contract, to obligate the United States to make payments as required by the contract, and to make payment of cancellation charges out of funds now or hereafter made available for expenditure to the AEC.

Mention also should be made of section 165 of the Atomic Energy Act of 1954 which prohibits direct payment or direct reimbursement by the AEC of Federal income taxes on behalf of section 164 contractors. The conference report on this provision states (House Report No. 2666, p. 50) that it was not intended to prohibit the inclusion of such taxes in the computation or adjustment of the base rate or cost structure of the contract. While sections 4.03, 4.09, and 4.11 of the Dixon-Yates contract provide for adjustments in payments to be made to the contractor based upon the amount of Federal income taxes it must pay, such adjustments are stated to constitute a part of the basic cost structure of the contract. In view of the expressed intent in the conference report that the contractor should be permitted to include the cost of Federal income taxes in the computation or adjustment of amounts to be paid by the AEC, it is my opinion that the adjustments for taxes permitted under these sections do not constitute direct reimbursement to the contractor for such taxes in contravention of section 165 of the Atomic Energy Act of 1954.

I am sure you will understand that this decision is limited to the legal questions discussed above, and has no bearing on the necessity or desirability of the contract, which is for administrative determination. Also, as you may know, certain provisions of the proposed contract have been the subject of discussions between representatives of the Commission and of this office. These matters do not affect the question submitted by your letter and in the interest of expediting this decision, they have not been considered herein.

A copy of this letter is being sent to the Joint Committee on Atomic Energy.

Sincerely yours,

/s/
FRANK H. WEITZEL
Acting Comptroller General
of the United States

October 20, 1954

Honorable Lewis L. Strauss
Chairman, Atomic Energy Commission
Washington, D. C.

Dear Mr. Strauss:

In connection with the Commission's request of October 1, 1954, contained in Mr. Joseph Campbell's letter to me of that date as Acting Chairman of the Commission, the President has authorized me to furnish you with an opinion with respect to the validity of the proposed power contract between the Atomic Energy Commission and the Mississippi Valley Generating Company. I also have your letter of October 5, 1954, enclosing a copy of the October 1, 1954 proof of the contract and stating that it has been agreed between the parties to revise the last "Whereas" clause of the contract on page 3 to read as follows:

> WHEREAS, this contract is authorized by and executed pursuant to the Atomic Energy Act of 1954, for the purpose of providing electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the Project;

Mr. Campbell's letter states that the particular question as to which my opinion is desired relates to the authority of the Atomic Energy Commission to enter into the contract, with special reference to Sections 164 and 165.b of the Atomic Energy Act of 1954 (Public Law 703, 83d Congress, approved August 30, 1954). Section 164 deals with the authority of the Atomic Energy Commission to enter into long-term power contracts; Section 165.b prohibits the Commission in connection with any contract entered into under the authority of the Act from making direct payment or direct reimbursement of any Federal income tax on behalf of the contractor. Mr. Campbell, with his letter of October 1, has transmitted a copy of an opinion of the General Counsel of the Commission in which the General Counsel concludes that the Commission has the power and authority to execute the contract and that its provisions relating to Federal income tax are not in conflict with the requirements of Section 165.b, *supra*.

It appears that without a contract such as this, the Atomic Energy Commission as an agency of the United States might be required to exercise its rights as a priority customer under the Tennessee Valley Authority Act (16 U. S. C. § 831, *et seq.*) and demand from the Tennessee Valley Authority the amount of power to be developed by the plant to be erected pursuant to the contract. This would seriously affect the present customers of TVA now receiving that power.

I have examined the contract and it is my opinion that the Atomic Energy Commission's authority to execute it cannot be questioned and that none of its provisions offends Section 165.b of the Atomic Energy Act of 1954. As to the first question, it will be noted that the contract states at page 2 that it is predicated on a proposal whereby the Mississippi Valley Generating Company (the Company) will construct and own a generating station of a stated net capability (approximately 650,000 kilowatts) and will furnish 00,000 kilowatts (even though one unit in the generating station may be out of service) to the Atomic nergy Commission (AEC), "or to the Tennessee Valley Authority (herein called TVA) for account of ne AEC in replacement of power furnished by TVA to the AEC." The contract further states in the

in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the Project." Section 1.09, (Article I, Definitions) defines the term "Project" as follows:

> Project shall mean the Oak Ridge installation, the Paducah installation, or the Portsmouth installation of the AEC or any other installation for which it may become lawful for the AEC to receive electric utility service under this contract.

Section 164 of the Atomic Energy Act of 1954 reads, so far as presently pertinent:

> ELECTRIC UTILITY CONTRACTS.—The [Atomic Energy] Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission * * * to enter into new contracts * * * to provide for electric utility services for periods not exceeding twenty-five years, and such contracts shall be subject to termination by the Commission upon payment of cancellation costs as provided in such contracts * * *. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof. * * *

The conference report on the bill which became the Atomic Energy Act of 1954 (H. R. 9757), explains that the last sentence in the above quotation was a Senate amendment and that it "authorized the Commission to enter into contracts to provide for replacement to the Tennessee Valley Authority of electric utility services furnished by TVA to the Commission in accordance with the basic authority * * *." H. Rept. No. 2666, 83d Cong., 2d Sess., p. 50. The "basic authority" referred to is that provided by Section 164. *Ibid.* I have no doubt that the contract, which specifically states as its purpose the providing of electric utility services to the Commission, or to TVA for the account of the Commission, in replacement of electric utility service furnished to the Commission by TVA in connection with the construction or operation of the Commission's installations at Oak Ridge, Paducah, or Portsmouth, is manifestly within the scope of the authority conferred upon the Commission by Section 164. It may be noted that under the language of Section 1.09 of the contract, defining the term "Project", it would be possible to extend the contract to installations of the Commission other than those at Oak Ridge, Paducah, and Portsmouth should such extension become lawful on some future occasion. It is plain, however, that a provision for future extension of the contract cannot affect its validity under existing law.

Section 165.b of the Atomic Energy Act of 1954 provides that "No contract entered into under the authority of this Act shall provide * * * for direct payment or direct reimbursement by the Commission of any Federal income taxes on behalf of any contractor performing such contract for profit." The conference report on the measure states with respect to the foregoing that "It was the intention * * * to prohibit the direct payment of Federal income taxes to contractors of the Commission, but it was not the intention * * * to bar inclusion of such taxes in the computation or adjustment of the base rate or cost structure of the Commission contract." H. Rept. No. 2666, *supra*, p. 50. I find nothing in the contract which, in my judgment, violates the prohibition of Section 165.b against direct payment or direct reimbursement by the Commission of Federal income taxes.

The provisions of the contract which appear to me to be of possible relevance in the consideration of Section 165.b appear in Sections 4.01 (p. 11), 4.03 (p. 12), 4.09 (p. 18), and 4.11 (p. 20). Section 4.01, in fixing the amount of the "Base Capacity Charge" at $9,052,050 per year, states that such charge takes into account certain cost factors including "costs with respect to federal income taxes". All of these costs are said to be "described or referred to in Appendix C" of the contract. That appendix discloses that in computing the costs included in the Base Capacity Charge the sum of $536,250 was assigned to the Federal income tax component of such costs, this on the basis of an assumed rate of return

of 9 per cent on an equity capital of $5,500,000, or $495,000, in respect of which the applicable index existing law, would be 52 per cent. The contract also shows in Appendix B that the total investment is estimated at $102,250,000, and that the cost of the borrowed money portion is figured at 5.437 per cent, to take care of interest at 3½ per cent and the annual amortization. In this connection I am advised that it is anticipated that such amortization charges will be offset by the annual charge for depreciation of the facilities. It should appear therefore that Capacity Charge has been computed on the basis that the Company, after net profit would yield 9 per cent on its equity investment of $5,500,000. The provisions of Section 4.01, in my opinion, conflict with the requirements of Section 165.b, and they are clearly within the intention of as reflected in the conference report cited above, that it is appropriate to include the taxes income taxes in the computation of the base rate structure of the contract. It is true that fixing the figure of $536,250 as the Federal income tax component of the Base Capacity Charge suggest that the actual tax which the Company may be required to pay will necessarily be the

Nor can it be argued, in my opinion, that any of the provisions of the other sections referred offend the requirements of Section 165.b. As has already been noted, the contract sets the Federal tax component of the base rate structure at $536,250 initially. Paragraph 2 of Section 4.09 provides formula for adjustment of this component to reflect such changes as may occur with respect to estimated tax rates. Section 4.09 recites that the rate structure will be sufficient to permit the Company to retire its indebtedness, in which regard it was assumed that the Company will be able to obtain a ruling authorizing it to deduct depreciation on a sinking fund basis. It is provided, however, that such a ruling not be obtained, the parties will agree to revise the rate structure so as to enable the Company to meet its debt retirement obligations. Finally, Section 4.11 establishes as part of the structure of the contract a replacement reserve. AEC is required to make payments into this reserve amounts which, after deduction of any Federal income taxes that may be assessed on such payments, give the Company sufficient funds to enable it to make the replacements necessary to keep it in "a dependable and efficient operating condition." It is my opinion that none of these provisions the requirements of Section 165.b and that they plainly comport with the intent of that Section as has been pointed out above, is to permit Federal income taxes to be included in the cost adjustment of the base rate or cost structure of the contract.

It should be expressly understood that this opinion does not consider in any manner questions are within the jurisdiction of regulatory bodies, such as the Securities and Exchange Commission, Federal Power Commission and any state bodies, the approval of which may be required in connection with the provisions of Section 8.15 of the contract.

Sincerely,

/s/ Herbert Brownell, Jr.
Attorney General

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

November 11, 1954

MISSISSIPPI VALLEY GENERATING COMPANY
P. O. Box 1376
West Memphis, Arkansas

Gentlemen:

This is with reference to the Power Contract No. AT-(49-1)-814 dated November 11, 1954, between your Company and the Atomic Energy Commission as amended by Supplement No. 1 dated November 11, 1954, the delivery of which is conditioned upon certain understandings contained in a letter dated November 11, 1954, from your Company to the Atomic Energy Commission and confirmed by the latter (the said Power Contract, Supplement thereto and letter concerning conditions of delivery being hereinafter referred to collectively as "the contract"). I wish to advise you that in my opinion the Atomic Energy Commission has power and authority to execute the proposed contract and the undertakings therein described and to obligate the United States of America for all payments which may be required to be made by the Atomic Energy Commission to your Company pursuant to any of the provisions of the proposed contract. It is further my opinion that Mr. Richard W. Cook, Acting Assistant General Manager for Manufacturing, and Mr. K. D. Nichols, General Manager, respectively, have full power and authority to execute and approve the contract on behalf of the Atomic Energy Commission and to make delivery thereof.

Sincerely yours,

WILLIAM MITCHELL

WILLIAM MITCHELL
General Counsel

WASHINGTON 25

B-120188 December 13, 1954

Honorable LEWIS L. STRAUSS, *Chairman*
Atomic Energy Commission
Washington 25, D. C.

Dear Mr. Chairman:

I have your letter of December 2, 1954, transmitting a copy of the contract with the Mississippi Valley Generating Company as revised since September 24, 1954, a copy of Supplement No. 1 thereto, and copies of other collateral documents pertaining to the contract.

Section 8.15 of the contract provides that the obligations of the parties thereunder shall be subject to

> "* * * the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress."

In answer to your request of September 24, 1954, you were advised by decision B-120188, dated October 5, 1954, that the Atomic Energy Commission had authority to enter into the contract in the form then proposed, to obligate the United States to make payments as required by the contract, and to make payment of contract cancellation charges out of funds then or thereafter made available for expenditure to the Commission. You were also advised that the proposed contract did not contravene the prohibition against direct reimbursement of Federal income taxes contained in section 165 of the Atomic Energy Act of 1954.

In view of the revisions in and the supplement to the contract made since that time, and the execution of the other collateral documents, you request my opinion whether the Commission has authority to enter into the contract as presently constituted and to make or to obligate the United States to make the payments specified in section 8.15.

The changes made in the contract do not, in my opinion, affect the conclusion reached in my decision of October 5, 1954, that the Atomic Energy Commission has authority to execute the contract, to obligate the United States for all payments required to be made by the Commission under the contract, and to make payment of cancellation charges out of any funds available to the Commission for expenditure.

However, mention must be made of the provisions of section 7.09 which was added to the contract by Supplement No. 1. By this section the Atomic Energy Commission is given the right, at any time within three years after the contract becomes effective, to purchase the facilities from the Company. If this option to purchase is exercised,

> "* * * the Company will transfer to the AEC all right, title and interest of the Company in and to all property, real, personal or mixed, included in the Facilities or contracted for or acquired for inclusion therein, and the contracts therefor, and the AEC shall assume all liabilities

then outstanding of every kind or nature theretofore incurred by the Company in connection with the acquisition or construction of the Facilities, including liabilities relating to debt securities of the Company, and shall indemnify the Company against all such liabilities. * * *"

Section 261 of the Atomic Energy Act of 1954 reads in part as follows:

"Sec. 261. Appropriations.—There are hereby authorized to be appropriated such sums as may be necessary and appropriate to carry out the provisions and purposes of this Act except such as may be necessary for acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion. * * *"

Thus, while section 164 of the Atomic Energy Act of 1954 provides expressly that "any appropriation presently or hereafter made available to the Commission shall be available for the payment of" cancellation costs provided for in long-term electric utility contracts authorized by that section, section 261 expressly refuses to authorize appropriations for acquisition of any real property, plant, or facility. Since the option to purchase under section 7.09 involves the acquisition of real property, it would appear necessary before such option could be exercised that an appropriation be available from which payments under section 7.09 could be made. Of course, if such an appropriation is available, there would be no doubt as to the authority of the Commission to assume the liabilities specified in section 7.09.

Sincerely yours,

/s/ FRANK H. WEITZEL
Acting Comptroller General
Of the United States

ATOMIC ENERGY COMMISSION

WASHINGTON 25, D. C.

December 2, 1954

Dear Mr. Comptroller General:

Since my letter of September 24, 1954, concerning the power contract which had been negotiated with the Mississippi Valley Generating Company and your reply of October 5, 1954, portions of the contract have been revised and it has been signed by the contracting parties. Revisions were made in the final "Whereas" recital, and in Sections 4.14 and 8.23 as indicated in the attached copy of the power contract. After the contract was signed, the contracting parties signed a letter to which was attached a memorandum, captioned "Memorandum Re Power Contract dated November 11, 1954, between AEC and Mississippi Valley Generating Company," which set forth the understanding of the contracting parties of the effect to be given to certain provisions of the contract. There was also executed Supplement No. 1 amending Sections 4.15, 7.08, 7.09 and 8.23 of the power contract. The power contract and Supplement No. 1 were signed and delivered on the conditions set forth in a letter agreement dated November 11, 1954. The reason for the conditions is explained in a letter from Mississippi Valley Generating Company dated November 11, 1954. By letter of the same date Mississippi Valley Generating Company advised the sponsoring companies, Middle South Utilities, Inc. and The Southern Company that it would terminate the power contract if the conditions set forth in the letter agreement with AEC dated November 11, 1954, did not occur prior to February 15, 1955, unless otherwise requested by the sponsoring companies. Finally, there has been executed a Letter Contract Number AT(49-1)-815 between the sponsoring companies, Middle South Utilities, Inc. and The Southern Company, and the Atomic Energy Commission relative to the furnishing of power to the Commission in certain contingencies. Copies of the foregoing documents are attached. There is also attached a copy of a Memorandum of Understanding between Middle South Utilities, Inc. and The Southern Company dated August 10, 1954.

Section 8.15 of the power contract with Mississippi Valley Generating Company provides in part that "the obligations of the parties hereunder shall be subject to the following:

> * * * the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress."

We are of the opinion that the Atomic Energy Commission has power and authority under the Atomic Energy Act of 1954 to execute this contract and the undertakings described therein and to obligate the United States of America for all payments which may be required to be made by the Atomic Energy Commission to the Mississippi Valley Generating Company pursuant to any of the provisions of the contract and that the persons who executed and delivered the contract on behalf of the AEC had

full power and authority to do so. However, in view of the revisions in the contract, since your recent review, and the execution of the supplemental and collateral documents mentioned above your opinion is again requested.

Sincerely yours,

LEWIS L. STRAUSS
Chairman

Enclosures:

1. Contract No. AT-(49-1)-814
2. Letter dated 11/11/54 with attachment "Memorandum Re Power Contract dtd 11/11/54 between AEC and Mississippi Valley Generating Co"
3. Supplement No. 1 to Contract No. AT-(49-1)-814
4. Letter Agreement dated 11/11/54
5. Letter dtd 11/11/54 re Letter Agreement of 11/11/54
6. Letter Contract No. AT-(49-1)-815
7. Memorandum of Understanding dtd 8/10/54
8. Letter MVGC to Sponsoring Companies dtd 11/11/54

The Honorable
The Comptroller General
of the United States

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

January 6, 1955

MR. DANIEL JAMES
CAHILL, GORDON, REINDEL & OHL
63 Wall Street
New York 5, N. Y.

Subject: Contract between U. S. Atomic Energy Commission and Mississippi Valley Generating Company, No. AT-(49-1)-814

Dear Mr. James:

In response to the questions which you asked me the other day with respect to the above-entitled contract, I wish to advise you as follows.

It is my opinion that the interpretative memorandum attached to the letter of November 11, 1954, signed by Mr. Dixon and confirmed by Mr. Cook, constitutes an agreement between the Atomic Energy Commission and the Mississippi Valley Generating Company as to the interpretation of certain provisions of the contract which, to the extent not inconsistent with the contract, is binding upon the parties in accordance with its terms. As you may recall, I advised the Joint Committee on Atomic Energy substantially to this effect on November 11, 1954 (Hearings, pp. 610, 611).

With respect to the last sentence of Section 7.09, which was added by Supplement No. 1, it is my opinion that the reference in that sentence to another agency of the United States "thereunto duly authorized" refers to an agency which is duly authorized by applicable statute or regulation to bind the United States Government in accepting transfer of the facilities, making the payments, assuming the indebtedness, and indemnifying the Company, all as contemplated by that sentence.

Sincerely yours,

WILLIAM MITCHELL

WILLIAM MITCHELL

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1960.

United States, Petitioner, v. Mississippi Valley Generating Co., etc.	On Writ of Certiorari to the United States Court of Claims.

[January 9, 1961.]

Mr. Chief Justice Warren delivered the opinion of the Court.

We granted certiorari to review the decision of the Court of Claims because the conflict-of-interest problem presented by this case has a far-reaching significance in the area of public employment and involves fundamental questions relating to the standards of conduct which should govern those who represent the Government in its business dealings.

The person with whose activities we are primarily concerned is one Adolphe H. Wenzell, Vice President and Director of First Boston Corporation[1] which is one of the major financial institutions in the country. At the suggestion of First Boston's Chairman, and subsequently at the request of the Bureau of the Budget, Wenzell undertook to advise the Government and act on its behalf in negotiations which culminated in a contract between the Government and the Mississippi Valley Generating Company (MVG), the respondent herein. The contract called for the construction and operation by the respondent of a $100,000,000 steam power plant in the Memphis, Tennessee, area. Ultimately, the plant was to supply 600,000 kw. of electrical energy for the use of the Atomic

[1] The positions held by the various individuals named in this opinion are those which were held at the time the transaction in question occurred.

Energy Commission (AEC). Before the plant was constructed, but after the respondent had taken some steps toward performing the contract, the AEC, which was the governmental contracting agency, canceled the contract because the power to be generated by the proposed plant was no longer needed. The respondent then sued the Government in the Court of Claims for the sums it had expended in connection with the contract.

The Government defended on several grounds, but primarily on the ground that the contract was unenforceable due to an illegal conflict of interest on the part of Wenzell. Specifically, the Government contended that at the time of Wenzell's employment by the Government, it was apparent that First Boston was likely to benefit, and as subsequently developed, in fact, did benefit, from the contract here in question; that Wenzell, as an officer of First Boston, was therefore "directly or indirectly" interested in the contract which he, as an agent of the Government, had helped to negotiate; that he consequently had violated the federal conflict-of-interest statute, 18 U. S. C. § 434; [2] and that his illegal conduct tainted the whole transaction and rendered the contract unenforceable.

A sharply divided Court of Claims rejected all of the Government's defenses and awarded damages to the respondent in the sum of $1,867,545.56.[3]

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[2] The statute reads as follows:

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

[3] There were four opinions in the lower court. The principal one was written by Judge Madden of the Court of Claims, and it was joined by Judges Laramore of the Court of Claims and Bryan, United States District Judge sitting by assignment. Judge Bryan

Because of the view which we take of the conflict-of-interest question, it will not be necessary for us to determine the validity of the other defenses raised by the Government in the court below, important though they may be.[4] With regard to the conflict-of-interest defense, there appear to be but two legal principles involved: (1) Did the activities of Wenzell constitute a violation of 18 U. S. C. § 434; and (2) if so, does that fact alone preclude the respondent from enforcing the contract. For reasons which we shall set forth in detail below, we think that the Court of Claims was in error and that both of these questions must be answered in the affirmative.

I.

Because the outcome of this case depends largely upon an evaluation of Wenzell's activities on behalf of the Government, a rather detailed statement of the facts is necessary in order to understand fully the nature of those activities and to place them in their proper context. The voluminous evidence in the case was heard by a trial commissioner. Based upon the commissioner's report and the briefs and arguments of counsel, the Court of Claims made

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also wrote a concurring opinion. Mr. Justice Reed (retired), sitting by assignment, wrote a dissenting opinion which was joined by Judge Jones, Chief Judge of the Court of Claims. Judge Jones also wrote a separate dissent.

[4] The other defenses raised by the Government were:

(1) That the AEC had not been authorized by the Atomic Energy Act of 1954 to make the contract;

(2) That the contract had not been placed before the Joint Committee on Atomic Energy in the manner required by the Atomic Energy Act;

(3) That the financing agreements required by the contract violated the Public Utility Holding Act of 1935;

(4) That the respondent had not obtained all of the regulatory approvals required for it to arrange the financing necessary for performance of the contract; and

(5) That the power contract was void for lack of mutuality.

very extensive findings of fact which cover approximately 200 pages in the transcript of record. Fortunately, it will not be necessary for us to consider the original evidence, since both parties have agreed to rely upon the Court of Claims' findings, and since we also conclude that those findings are sufficient to dispose of the issues presented. However, it should be noted that our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them. See *United States* v. *E. I. du Pont de Nemours*, 353 U. S. 586, 598; *Great Atl. & Pac. Tea Co.* v. *Supermarket Equip. Co.*, 340 U. S. 147, 153–154.

First. At the outset, we think it is appropriate to discuss, in a general way, the origin of the contract here in question and the negotiations which led to the ultimate agreement. The story of this contract begins in the early days of 1953. Almost immediately after assuming office, President Eisenhower announced his intention to revise the Government's approach to the public power question. In his first State of the Union Message, delivered on February 2, 1953, the President indicated that it was his intention to encourage either private enterprise or local communities to provide power-generating sources in partnership with the Federal Government. Consonant with this policy, Joseph M. Dodge, Director of the Bureau of Budget, decided in the fall of 1953 to eliminate from the Tennessee Valley Authority's (TVA) budget for the fiscal year 1955 a request for funds to be used for the construction of a steam-generating plant at Fulton, Tennessee. The proposed TVA plant was to have served the commercial, industrial, and domestic power needs of the City of Memphis and its environs. When Gordon Clapp, the General Manager of TVA, learned of Dodge's decision, he immediately informed persons working in the Bureau of the Budget that if provision for the Fulton plant were

eliminated from TVA's budget, TVA would take the position that the amount of power then being supplied by TVA to the AEC should be reduced so that sufficient power would be available to meet the growing demands of TVA's other customers. As a result of this statement by Clapp, the Bureau of the Budget began drafting a statement for the President's budget message to the effect that steps would be taken to relieve TVA of some of its commitments to the AEC, and that if efforts in that direction proved unsuccessful, the possibility of the construction of a plant by TVA at Fulton would be reconsidered.

On December 2, 1953, Dodge met in his office with Lewis L. Strauss, Chairman of the AEC, and Walter J. Williams, General Manager of the AEC. Dodge said that he hoped to avoid further expenditures by TVA for the construction of power-generating plants, and that he thought the AEC should investigate the possibility of reducing its consumption of TVA-generated power by contracting with private industry for the construction of a plant that would supply 450,000 kw. of additional power for the AEC at its Paducah, Kentucky, installation by 1957. Dodge inquired whether the plan outlined by him would be feasible, and Williams replied that he could not answer the question until he had consulted with J. W. McAfee, the President of Electric Energy, Inc., a private utility company which had previously entered into long-term power contracts with the AEC similar to the one described by Dodge.

After the meeting, Williams arranged to meet with McAfee, and this meeting occurred on December 8, 1953. Williams asked McAfee whether he knew of a private power company that might be interested in building a plant to supply the AEC with as much as 450,000 kw. of generating capacity by the middle of 1957. McAfee stated that it might be difficult for his company to do the

job, but he agreed to make some inquiries about the matter. Later, on December 14, 1953, McAfee wrote a letter to the AEC indicating that he thought a group of private investors could be formed to supply the AEC the amount of power requested. Because of the Budget Bureau's continuing interest in the progress of the plan, a copy of McAfee's letter was requested by and sent to William F. McCandless, Assistant Director for Budget Review in the Bureau.

Sometime prior to December 14, 1953, Edgar H. Dixon, President of Middle South Utilities, learned from McAfee that the AEC might be seeking an additional source of power in the Paducah area. On December 23, 1953, Dixon came to Strauss' office for a meeting with Williams, Strauss, and Kenneth D. Nichols, who had been selected to succeed Williams as General Manager of the AEC. The purpose of the meeting was to discuss the possibility of having private utility companies build additional generating capacity near Paducah for the purpose of relieving TVA of its commitments to the AEC there. Shortly after the meeting had concluded, Williams called McCandless at the Bureau of the Budget to inform him of what had transpired at the meeting. On the next day, December 24, 1953, Rowland Hughes, Assistant Director of the Bureau of the Budget, wrote to Strauss, stating that it would be helpful if the AEC would continue negotiations with private power interests with a view toward reaching a firm agreement for the supply of power to the AEC at Paducah.

On January 4, 1954, McAfee wrote a letter to Williams in which he expressed some doubts about the plan suggested by the Government. He thought that it might be wiser for TVA to reduce its commitments to the numerous municipalities which it supplied with power, or for TVA to arrange with neighboring power companies to buy power from them. Shortly after Williams received this

letter, a meeting was held in Strauss' office, and those present were Strauss, Williams, Nichols, Hughes, and McCandless. Nichols, speaking for the AEC, expressed a certain reluctance to continue the negotiations. He pointed out that if the AEC purchased more power from private utilities in lieu of the power already being supplied by TVA, the cost to the AEC would be greater and the supply less certain because of possible delays in the construction of the plant and the location of reserve power. He also noted that McAfee was apparently no longer eager to enter into the contract; that from an engineering point of view, Paducah was a poor location for the site of the new plant; and that if more power was needed in the Memphis area, it would be better for the City of Memphis or for TVA to enter into a contract with private companies for the construction of a plant at that location. McCandless requested that the AEC pursue the matter at greater length with McAfee.

Pursuant to this request, a meeting was arranged for January 20, 1954, between McAfee and Dixon and representatives of the Budget Bureau and the AEC. At the meeting it was made clear to Dixon and McAfee that the purpose of the power plant was to relieve the pressure on TVA in the Memphis area by reducing its commitments to the AEC. The discussion therefore turned to the possibility of constructing the plant at Memphis rather than at Paducah. Dixon suggested that since the power would be supplied directly to TVA, it might be better for TVA, rather than for the AEC, to act as the contracting agency. However, the government representative preferred that the AEC contract and pay for the power, even though the actual delivery of power would be made to TVA. It was finally agreed that Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could supply 450,000 to 600,000 kw. of power in the Memphis area.

When it became apparent that the new plant was to be located at Memphis, McAfee lost interest in the project because the location was far removed from the pool area of the companies in which he was interested. Dixon therefore proceeded on his own to draft an initial proposal. During the period in which Dixon was preparing his proposal, he kept in close contact with several government officials, especially Wenzell. The nature and scope of these associations will be discussed below.

On February 19, 1954, Dixon met with Eugene A. Yates, Chairman of the Board of the Southern Company, a public utility holding company. Dixon's purpose in calling this meeting was to persuade Yates that Southern should join Middle South in building the proposed power plant. The next day Yates notified Hughes at the Bureau of the Budget and Nichols at the AEC that Southern had decided to join in the venture.

On February 25, 1954, Dixon and Yates (hereinafter referred to as the sponsors) submitted their proposal to the AEC. They offered to form a new corporation (MVG) which would finance and construct generating facilities from which 600,000 kw. of electrical power would be delivered to TVA in the Memphis area for the account of the AEC. We do not think it is necessary to relate the details of the proposal. Suffice it to say that after a comprehensive joint analysis by TVA and the AEC, the Government decided that the cost estimates contained in the proposal were too high. In fact, the analysis showed that the proposal would cost over seven million dollars more per year than the proposed TVA plant at Fulton would have cost. At the sponsors' request, another analysis was made by Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission. Adams confirmed the conclusions of the AEC and TVA, and said that the figures in the proposal were much higher than a reasonable estimate of costs to the sponsors should require.

By March 24, 1954, it became apparent to the sponsors that their initial proposal was unacceptable to the Government. Therefore, they worked from March 26 to April 1, 1954, to draft a proposal which would be more agreeable to the Government. This second proposal was ultimately submitted to the AEC on April 12, 1954. An intensive joint analysis was again made by the AEC and TVA. Although the findings of fact do not specifically indicate wherein the second proposal differed from the first, the second proposal was more to the Government's liking, and the analysts suggested that it could be a basis for the negotiation of a final contract. On April 24, 1954, Hughes sent President Eisenhower a memorandum reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct the AEC to conclude a final agreement. On June 16, 1954, the President authorized AEC to continue negotiations with the sponsors and to attempt to consummate an agreement based generally upon the terms of the second proposal.

The negotiation of the final contract began on July 7, 1954, and concluded with the signing of the contract on November 11, 1954. The Government was represented by a "competent and aggressive staff of negotiators."[8] Although the final contract was slightly different from the second proposal, in a general way, it was within the terms of that proposal. The contract became effective on December 17, 1954.

In June 1955, after the respondent had taken some preliminary steps toward performance of the contract,[9] the

[8] Any quoted material in the statement of facts is taken from the Court of Claims' findings of fact.

[9] Those steps consisted of undertaking initial action toward financing the project, attempting to obtain the regulatory approvals required under the terms of the contract, taking options on land which was to be the site of the plant, and letting some of the basic construction contracts.

sponsors learned that President Eisenhower had requested the Bureau of the Budget, the AEC and TVA to consider whether the contract should be terminated because in the interim the City of Memphis had decided to construct a municipal power plant, thereby obviating the need in that area for TVA-generated power. On July 11, 1955, the sponsors were informed by the Chairman of the AEC that the President of the United States had decided to terminate the contract. During the months that followed, representatives of the sponsors and of the AEC attempted to agree upon a mutually acceptable basis for terminating the contract. On November 23, 1955, after protracted congressional debate concerning the propriety of Wenzell's activities on behalf of the Budget Bureau, the AEC advised the sponsors that, upon the advice of its counsel, it had reached the conclusion that the contract was not an obligation which could be recognized by the Government. This suit for damages was then initiated.

Second. Having sketched the general background of this litigation, we think it is now appropriate to set forth in some detail a description of Wenzell's connection with the Government and of the role he played in the negotiations, for it is these activities on behalf of the Government, as well as his affiliation with First Boston, which constitute the basis for the Government's assertion of a conflict of interest.

Wenzell's first contact with the Government actually antedates any of the negotiations relating to the contract here in question. However, his earlier association with the Government does have a bearing on the issues with which we are primarily concerned, and we shall therefore advert briefly to that phase of Wenzell's activities. In May 1953, George D. Woods, Chairman of First Boston, met with Dodge at the latter's office in the Bureau of the Budget. Woods expressed his agreement with the Administration's newly announced policy of reducing the

Government's participation in business activities, and he offered the services of himself and his firm in any way that might help to achieve the Administration's objective. Dodge replied that he was interested in having some studies made on the amount of subsidy that TVA was receiving from the Federal Government. Dodge indicated that he had not been able to find the right person to conduct these studies, and he asked Woods if he could suggest someone. Woods replied that First Boston did have a man who had worked on many utility financing transactions and who would be qualified to do the work described by Dodge. The man referred to was Wenzell. Woods promised that he would endeavor to make Wenzell's services available for the special project described by Dodge. At the time, Wenzell was a vice president of First Boston and one of its directors. He had been with the firm since its inception in 1934 and before that with its predecessor since 1923. He owned stock in First Boston, although the stock was in his wife's name.

Upon returning to New York, Woods conferred with Wenzell and with other executives of First Boston. Wenzell indicated his willingness to take the job, and none of the other men consulted had any objection. A meeting between Dodge and Wenzell was therefore arranged for May 15, 1953. At the meeting it was agreed that Wenzell would serve as a part-time consultant to the Bureau, spending one or two days a week in Washington until the project was completed. Wenzell was to receive no compensation from the Government, but he was to be given $10 per day in lieu of subsistence plus transportation expenses. It was understood that he would neither resign his position with First Boston nor relinquish any part of his regular salary or yearly bonus based on the business which he brought to the firm.

Wenzell's task was to make a financial analysis of TVA for the purpose of estimating the amount and source of the

subsidy given to TVA by the Government. Wenzell began his work for the Bureau on May 20, 1953, and his final report was submitted on September 20, 1953. During his four months with the Government, Wenzell was made privy to a vast quantity of data, much of it confidential, contained in the TVA files. Wenzell's final report was generally favorable toward TVA's technical operations, although it suggested that some of TVA's internal accounting systems should be revised and that its service area should not be expanded. The report also contained many unsolicited recommendations to the effect that future demands for power in areas supplied by TVA should be met by private or municipal power plants rather than by an expansion of TVA's facilities. When the report was delivered to Dodge, he read it briefly and was surprised to see that Wenzell had included in the report these recommendations, which had not been requested. Subsequently, after Wenzell had severed his connection with the Bureau, he showed a copy of his report to Woods, although Dodge had expressly admonished Wenzell that the report was a confidential document and should be shown to no one.

Wenzell's next contact with the Government came in January 1954, shortly after the Bureau had commenced the above-described preliminary negotiations with McAfee and Dixon. At the request of Hughes, Wenzell came to Washington on January 18, 1954, to confer on the possibility of his returning to the Bureau on a part-time basis to assist in the negotiations with Dixon. The decision to call upon Wenzell's talents was made by Dodge and Hughes, for it was thought that Wenzell's knowledge of TVA, based upon the analysis theretofore made by him, and of commercial transactions generally would be of great value during the negotiations. At the meeting, Hughes informed Wenzell of the Government's intention to arrange for the construction of a privately owned

power plant near Memphis. Wenzell was also told about the exploratory negotiations which had taken place in December 1953 between the AEC and McAfee and Dixon. Wenzell's chief responsibility was to act as a consultant in the technical area of interest costs for any financing that would have to be undertaken in connection with the contract. Again, as in 1953, Wenzell was not asked to sever his connection with First Boston, and he did not do so. At the close of the meeting, Wenzell informed Hughes that he knew both Dixon and McAfee and that in 1948, or 1949, he had talked to Dixon in connection with services that First Boston proposed to render to one of Dixon's companies. Hughes asked Wenzell to attend a forthcoming meeting between the AEC and Dixon and McAfee. "Hughes emphasized the need for great speed on the project," and he asked Wenzell "to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter."

At the request of Hughes, Wenzell went to the AEC on the afternoon of January 18, 1954, to confer with Strauss. Strauss acquainted Wenzell with the purpose of the meeting scheduled for January 20, and impressed upon Wenzell the necessity for prompt action. On the following day, Wenzell called Dixon and told him that he would be present at the January 20 meeting as a representative of the Budget Bureau and that Dixon should not be surprised when he saw Wenzell at the meeting.

As prearranged, Wenzell attended the January 20 meeting, and he was the only representative of the Budget Bureau there. However, he did not come to the meeting unescorted. "On his own volition and without consulting any representative of the . . . [Government] or of First Boston, Wenzell took with him Paul Miller an assistant in First Boston's buying department." The meeting lasted for several hours and the drift of the discussion has been

described above. At the close of the meeting, Dixon said that he would begin investigating the feasibility of the type of contract desired by the Government, and it was agreed that Wenzell would talk to Tony Seal of Ebasco, an engineering firm which serviced Dixon's projects.

Wenzell returned to New York after the meeting, but before he left, Hughes "requested Wenzell to stay in touch with Dixon and his associates on the development of a proposal and particularly to help point up the real cost of money to be used in financing the project." On January 21, 1954, Wenzell conferred with Seal. He informed Seal of what had happened in Washington and instructed him to begin a study of the proposed project. Seal met with Wenzell again on January 27, 1954, and the former described his progress on the study he was making. "Wenzell stated that he was at . . . [Seal's] service as a representative of the Bureau of the Budget on the all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant."

Wenzell went to Washington on February 4, 1954, to inform Hughes of what had transpired at his meetings with Seal. He met Dixon in Washington, and the two men flew to New York together that evening. During the flight, Dixon "asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates in the then current money market would be for financing a project similar to the OVEC project."[1]

[1] OVEC stands for the Ohio Valley Electric Corporation, which is a generating company composed of several private utility companies. In 1952, OVEC had contracted with the AEC to supply it with power at its Portsmouth, Ohio, installation. The Portsmouth project required a large amount of financing, and First Boston had been retained to handle the arrangements. First Boston was still engaged in its Portsmouth undertaking when Wenzell first came to the Bureau of the Budget in 1953.

On February 5, 1954, Wenzell met with other executives of First Boston in an attempt to obtain the information requested by Dixon. After Wenzell thought he had found the answer to Dixon's question, he called Dixon and advised him of the information he had acquired from his colleagues at First Boston. During the week that followed, Wenzell made further studies and engrafted certain refinements onto his calculations. Then, on February 14, 1954, he attended a meeting in Dixon's office and gave Dixon the new figures which he had computed.

After McAfee dropped out of the negotiations because of the proposed site of the new plant, Dixon began to search out support from other quarters. One of those from whom he sought assistance was Yates. Dixon arranged a meeting with Yates on February 19, and he requested Wenzell, who had known Yates for several years, to be present. The meeting occurred as scheduled, and Wenzell was the only representative of the Government present. As indicated, Yates agreed to join the project on February 20, 1954.

During his next trip to Washington on February 23, 1954, Wenzell drafted a letter to Dixon giving his opinion as to the cost of money. The information in this letter conformed to the oral opinion which Wenzell had rendered on February 14, 1954. The letter was on First Boston stationery and was signed by Wenzell as an officer of First Boston. Two days later, on February 25, 1954, the sponsors submitted their first proposal. The proposal contained only one reference to the cost of money, and that paragraph read as follows:

> "We have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions and our offer is conditioned upon such consummation."

The "responsible financial specialists" upon which the sponsors relied were Wenzell and his colleagues at First Boston, and the cost data upon which they conditioned their proposal was that which was contained in the opinion letter drafted by Wenzell.

Wenzell did not participate in the initial study of the sponsors' proposal, but on March 1, 1954, he attended a Budget Bureau staff meeting which had been called for the purpose of completing the review of the proposal. Wenzell brought with him to this meeting Powell Robinson, an assistant vice president of First Boston's sales department. Wenzell, who by March 1 had completed his function as a consultant on the cost of money, now assumed the role of a consultant on the total cost of the project. His initial reaction was that the cost estimates contained in the first proposal were too high. When it became apparent that Wenzell could not answer all of the technical questions relating to engineering costs, Wenzell decided to call Seal down from New York. Seal arrived on the following day and the meeting was continued. As it turned out, Seal was also unable to answer all the questions asked by staff members, and Hughes was advised that, despite Wenzell's insight into the problem, there still remained areas of uncertainty. It was then suggested by a staff member that a joint AEC–TVA analysis be made. Immediately after Hughes made his decision, Wenzell informed Seal that such an analysis was to be made.

On March 9, 1954, a meeting took place at the Bureau of the Budget. The joint AEC–TVA analysis was discussed, and it was the view of all present that the cost estimates were too high. Wenzell was therefore instructed to inform Seal that the sponsors should try to submit a more acceptable proposal. Wenzell conveyed the information to Seal as requested. On the next day, Wenzell arranged a meeting between Duncan Linsley, the Chairman of First Boston's Executive Committee, and

the sponsors. Dixon had requested the meeting so that he could confirm with a reliable source the cost-of-money information previously given him by Wenzell.

On March 15, Wenzell participated in another Budget Bureau meeting which had been called to discuss the final AEC–TVA analysis. In addition to Wenzell, those present at the meeting were the sponsors and Dodge. The sponsors requested that an independent analysis of the proposal be made, and Wenzell suggested that Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission, be requested to make the analysis. As indicated above, this suggestion was subsequently adopted.

On March 16, 1954, several representatives of the sponsors met in Dixon's hotel room to draft a letter replying to the unfavorable conclusions contained in the AEC–TVA analysis. The evidence does not clearly demonstrate whether or not Wenzell was present at this meeting, but the Court of Claims found that Wenzell saw the letter and made several changes on it for the sponsors in his own handwriting. The letter was never sent to the AEC.

On March 23, 1954, Wenzell met with Adams and conferred with him on the proposal and the analysis which Adams was making. While Adams was preparing his analysis, the sponsors were working on some revised estimates. A meeting was called at the Budget Bureau for April 3, 1954, to discuss both Adams' analysis and the sponsors' new estimates. At the meeting, Wenzell once again confirmed the information he had previously given the sponsors on the cost of money. At the conclusion of the meeting, it was decided that the sponsors should undertake to prepare a new proposal in line with their revised estimates. On the afternoon of April 3, Wenzell saw Nichols of the AEC, who said that the sponsors' most recent estimates might prove acceptable. "He suggested that Wenzell encourage the sponsors to refine their figures."

April 3 was the last time that Wenzell came to Washington in his capacity as a consultant to the Bureau. However, the sponsors consulted him from time to time in the preparation of their second proposal, which was dated April 10, 1954, and was submitted to the AEC on April 12, 1954. Wenzell reconfirmed the information which he had previously given the sponsors on the cost of money, and "this information was relied upon by the sponsors in the drafting of the second proposal." The second proposal, like the first, contained a paragraph indicating that the sponsors relied upon Wenzell's advice and conditioned their offer on that advice.

Wenzell took no part in the final negotiations which led to a formal contract based upon the second proposal. The Court of Claims found that Wenzell terminated his association with the Bureau on April 3, 1954; however, Wenzell felt that his relationship with the Bureau ended on the date of the sponsors' second proposal, April 10, 1954. The findings show that Wenzell received a telephone call from Dixon regarding the second proposal as late as April 10, 1954, and that McCandless and Wenzell also had a telephone conversation on that date. Wenzell never tendered either an oral or written resignation; he merely stopped working on behalf of the Bureau.[8]

Third. The findings of the Court of Claims make it perfectly clear that the conflict-of-interest question in the case arose many months prior to the time at which the

[8] In our rehearsal of the facts, we have necessarily omitted mention of numerous inconsequential meetings and telephone conversations between Wenzell and representatives of the Government and of the sponsors. We make this fact known only to complete the picture and to indicate that Wenzell was continuously involved in the negotiations during his tenure with the Bureau of the Budget. It should also be noted that Hughes was aware of most of Wenzell's activities, both those which we have described and those which we have not mentioned in detail.

Government concluded that the contract was unenforceable. Those who first showed concern about the duality of Wenzell's interests were the sponsors themselves. Around February 20, 1954, Dixon's counsel, Daniel James, expressed apprehension about the fact that Wenzell was an officer of First Boston and was also an employee of the Budget Bureau. "James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project. Therefore, James told Dixon that since Wenzell was an officer of First Boston and was also employed by the Budget Bureau, a difficult situation might be created if Dixon should subsequently ask First Boston to handle the financing of the project." James thought that the public power advocates would "make it appear that there was a taint of illegality," attached to the project. As a result of his discussion with James, Dixon later spoke to Wenzell about the "embarrassment" that might result if First Boston were to be retained as financial agent. Dixon suggested that Wenzell talk to his superiors at the Budget Bureau about the situation.

On February 23, 1954, Wenzell followed Dixon's advice and spoke to Hughes about the matter of duality. He alluded to the fact that he had given the sponsors an opinion letter on the probable cost of money for financing the project, and that First Boston was the source of the information given to the sponsors. "He then pointed out to Hughes that if it later developed that First Boston should be asked to handle the financing for the sponsors and should give them a letter similar to Wenzell's draft, the fact that he had been the instrumentality for obtaining the interest figure from First Boston, had given the figure to the sponsors, and had used the same figure in his draft could cause criticism against and embarrassment to the Administration, in that it could be charged

that he, as a First Boston officer and while employed as a special consultant to the Bureau of the Budget, had improperly used his position in the Bureau to obtain business for First Boston." Hughes replied that he thought Wenzell was exaggerating the problem, but he nevertheless advised Wenzell to discuss the matter with his associates at First Boston, with his counsel, and ultimately with Dodge.

Wenzell returned to New York on February 23, 1954, and spoke to James Coggeshall, President of First Boston. Coggeshall thought that the matter was important and suggested that First Boston's counsel, Sullivan and Cromwell, be consulted. Arthur Dean, the partner in the firm who generally handled First Boston's business, was leaving town, and he suggested that Wenzell see John Raben, another member of the law firm. On February 26, 1954, Wenzell met with Raben and described the activities in which he had engaged on behalf of the Budget Bureau. "Raben advised Wenzell that he should terminate his relationship as consultant with the Budget Bureau forthwith and in writing. He also advised that if the proposal was later accepted and First Boston was requested to handle the financing, the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee. Finally, he told Wenzell that he should keep Dodge and Hughes informed about any developments in the matter, including any decision which First Boston might later make as to handling the financing of the project." On the same day Raben telephoned Dean, who confirmed the advice which Raben had given Wenzell.

During the days that followed, Wenzell, in conversation, recognized the danger of his dual position, but he did not resign, as he had been advised to do. On one occasion, he was describing his uneasiness to one of his coworkers at the Budget Bureau, and his colleague said

that he thought Wenzell "was working both sides of the street" and was likely to get in serious trouble. He suggested that Wenzell's actions were attributable to his lack of familiarity with the restrictions applicable to Government employees as compared with practices in private business." On another occasion in early March 1954, Wenzell told other associates at the Bureau that "he felt that he was in an awkward position in connection with his work on the sponsors' proposal." Then, on March 9, 1954, Wenzell spoke to Dodge about his problem. "Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible."

In the meantime, both James and Dixon learned that Wenzell had been advised by his counsel to resign immediately. When in early March 1954, James learned that Wenzell had not yet resigned, he asked Hughes why Wenzell had been permitted to continue as a consultant to the Bureau. James expressed the same fears to Hughes that he had earlier expressed to Dixon.

On March 3, 1954, Raben called Wenzell to find out whether the latter had resigned. Wenzell said that he had not resigned, but he assured Raben that he was in the process of doing so. Dean then telephoned Wenzell and told him "to resign promptly and in writing." Dean's concern continued, and on March 10, 1954, he told Raben to call Wenzell again to find out whether he had resigned. Wenzell indicated that he had not as yet resigned, but that he would do so immediately. Consequently, Raben took no further action on the matter. However, as indicated, Wenzell never resigned and did not cease to act for the Bureau until approximately the date on which the second proposal was submitted.

Fourth. The final set of facts with which we are concerned relates to the retention of First Boston as the

financing agent for the project. On April 12, 1954, the day on which the second proposal was submitted to the Government, the sponsors met with numerous executives of First Boston, among whom was Wenzell. The sponsors requested a letter confirming Wenzell's information on interest costs. First Boston was also asked to prepare a memorandum on what it thought would be a proper financial plan for the project. At this meeting, Wenzell had discarded his Budget Bureau hat, and had resumed his role as a First Boston vice president. By the time of the meeting, Wenzell "expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from" the second proposal.

About the middle of April 1954, an executive at Lehman Brothers, another major investment banking firm, learned of the possibility of a contract between the sponsors and the Government. Lehman Brothers thereupon notified the sponsors that it wished to be considered in connection with the financing of the project. Subsequently, in May 1954, Dixon told Woods that if First Boston was to arrange for the financing, it would probably be a good idea for Lehman Brothers also to be associated with the project. Woods was very cool to the idea of Lehman Brothers' participation, and he indicated that he would have to consult his colleagues about it.

On May 11, 1954, Woods told Dixon that First Boston did not wish to share the financing arrangements with Lehman Brothers, and that it might be better for First Boston to withdraw from the project. However, said Woods, if Dixon did not want Lehman Brothers to handle the financing alone, First Boston would be willing to associate with Lehman Brothers "on the condition that First Boston would have the dominant position so far as authority was concerned and would also have the senior position with respect to advertising and the division of fees." Woods pointed out that in the financial business senior

position as to advertising was a matter of great importance. He felt that First Boston would achieve great prestige were it to arrange for the financing of the project, and that as a result of its activities First Boston would probably receive other business of the same kind.

Thereafter, First Boston, having already given Dixon a letter confirming Wenzell's information on interest costs, began to prepare a plan for the debt financing. Although Wenzell was not directly responsible for the preparation of the plan, he did assist those who were drafting it. At a meeting on May 18, 1954, the final draft plan for the financing of the project was discussed by the sponsors, First Boston, and Lehman Brothers. The plan called for the direct placement of up to $93,000,000 worth of bonds and up to $27,000,000 worth of unsecured notes. The plan was approved, and it was also decided "that the fee for the financial agents would be divided on the basis of 60 per cent to First Boston and 40 per cent to Lehman Brothers and that First Boston would have preferred position on any advertising."

Since no formal agreement of retainer was ever signed it is difficult to pinpoint the date on which First Boston was actually retained. However, Dixon believed that First Boston had been retained on April 12, when it had been asked to prepare an opinion letter and a memorandum on procedures to be used in financing the project.

Some time in late May 1954, Woods decided that it would be better for First Boston not to charge a fee for its services. The executive committee of First Boston tentatively decided not to accept a fee on July 1, 1954, and that position was formally adopted on October 21, 1954. The decision not to charge a fee was based on Woods' conclusion that the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget

Bureau to assist the Administration in connection with its power policy, and that First Boston should not charge a fee for assistance in obtaining funds that were designed to obviate the necessity of Federal expenditures for the expansion of TVA."

As of February 18, 1955, First Boston had made no formal announcement of its decision not to charge a fee; nor had it notified the Government concerning the decision. On that date, Senator Lister Hill of Alabama made a speech criticizing the activities of Wenzell and First Boston and emphasizing Wenzell's conflict of interest.[1] On the next day, Woods released a statement to the press indicating that neither Wenzell nor First Boston had received or would receive any fee for the services rendered in connection with the project. Lehman Brothers had previously indicated that it thought some fee should be charged, and when Woods released the press statement, representatives of Lehman Brothers were upset because they had not been consulted first. Although Dixon had heard that First Boston was contemplating not charging a fee, he did not understand that a final decision on that subject had been made. Even as late as May 5, 1955, Dixon told First Boston that he anticipated questions from the SEC regarding First Boston's fee, and he requested that First Boston give him a clear statement on the matter. In response to this request, First Boston gave Dixon a letter indicating that it would take no fee for the financing services to be rendered in connection with the project. "Dixon was surprised by First Boston's decision not to accept a fee for its services as financial agent. The decision was unusual and without precedent in the history of First Boston." Finally, on May 11, 1955, Lehman Brothers decided that, in view of First Boston's decision, it would also agree not to charge a fee.

[1] 101 Cong. Rec. 1714.

Despite the fact that Wenzell had earlier promised to inform Dodge of any agreements between First Boston and the sponsors and to submit those agreements to the Budget Bureau for approval, and despite the fact that First Boston's counsel had advised Wenzell to inform the Budget Bureau of any such agreements, neither Wenzell nor anyone connected with First Boston informed the Budget Bureau of First Boston's retention by the sponsors. The Bureau of the Budget did not learn of First Boston's retention until February 18, 1955. The AEC was informed on July 7, 1954, that First Boston and Lehman Brothers were acting as financial agents for the sponsors. However, "there is no evidence that any representative of AEC had knowledge up to . . . [December 1954] that Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project."

II.

As is apparent from a recitation of the facts, this case touches upon numerous matters with which we are not concerned. Therefore, at the outset, we think it is important not only to delineate the issues upon which our decision turns, but also to specify those collateral issues which are not pertinent to our decision. As already indicated, we are interested only in whether Wenzell's executive position with First Boston and his simultaneous activities on behalf of the Government constituted an illegal conflict of interest; and if so, whether the conflict of interest rendered the contract unenforceable. In reaching our decision on these questions, we do not consider and have no interest in the following matters:

(1) The policy of the Administration concerning the relative merits of public versus private power development;

(2) The desire of the respondent and Wenzell and his corporate associates to advance the policies of the Administration;

(3) The employment of so-called "dollar-a-year" men, such as Wenzell, to advise the Government in matters of business, industry, labor, and the sciences; and

(4) The reasonableness or unreasonableness of the contract ultimately negotiated, that not being an issue in the case, and there being no burden on the Government to establish financial loss.

First. In determining whether Wenzell's activities fall within the proscription of Section 434, we think it is appropriate to focus our attention initially on the origin, purpose, and scope of the statute. Section 434 is one of several penal conflict-of-interest statutes which were designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public.[10] It is a restatement of a statute adopted in 1863 following the disclosure by a House Committee of scandalous corruption on the part of government agents whose job it was to procure war materials for the Union armies during the Civil War.[11] The statute has since been re-enacted on several occasions,[12] and the broad prohibition contained in the original statute has been retained throughout the years.

The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. *United States* v. *Chemical*

[10] The other statutes are, 18 U. S. C. §§ 216, 281, 283, 284, 1914.

[11] Act of March 2, 1863, c. 67, § 8, 12 Stat. 696, 698. See H. R. Rep. No. 2, 37th Cong., 2d Sess., Government Contracts and Appendix.

[12] R. S. § 1783; Act of March 4, 1909, c. 321, § 41, 35 Stat. 1097; Act of June 25, 1948, 62 Stat. 703.

Foundation, 272 U. S. 1, 18. The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters. *Matt.* 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service, or to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. Nor is the statute's scope restricted by numerous provisos and exceptions, as is true of many penal statutes.[12] Rather, it applies, without exception, to "whoever" is "directly or indirectly interested in the pecuniary profits or contracts" of a business entity with which he transacts any business "as an officer or agent of the United States."

It is also significant, we think, that the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To-

[12] See, e. g., 18 U. S. C. §§ 431–433; 15 U. S. C. §§ 1, 13; 13c.

this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation."[16] *Rankin* v. *United States*, 98 Ct. Cl. 357.

While recognizing that the statute speaks in broad, absolute terms, the respondent argues that to interpret the statute as laying down a prophylactic rule which ignores the actual consequences of proscribed action would be a violation of the time-honored canon that penal statutes are to be narrowly construed. But even penal statutes must be "given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U. S. 540, 552; *Rainwater* v. *United States*, 356 U. S. 590, 593; *United States* v. *Corbett*, 215 U. S. 233, 242. In view of the statute's evident purpose and its com-

[16] "The preventive nature of conflict-of-interest statutes was ably described by the Court of Claims in *Michigan Steel Box Co.* v. *United States*, 49 Ct. Cl. 421, 439:

"'The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them. . . .'"

We have taken a similar view of the evils which flow from contingent fee arrangements for obtaining government contracts. In *Hazelton* v. *Sheckells*, 202 U. S. 71, 79, we said: "The objection to them rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear." See also *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 275; *Tool Co.* v. *Norris*, 69 U. S. (2 Wall.) 45, 55.

prehensive language, we are convinced that Congress intended to establish a rigid rule of conduct which, as we shall now demonstrate by analyzing each of the elements of the statutory prohibition, was violated by Wenzell.

The first question is whether Wenzell acted as an "officer or agent of the United States for the transaction of business." Judged by any reasonable test, the facts which we have recited above demonstrate that he was the Government's key representative in the crucial preliminary negotiations between the Government and the sponsors. Because Wenzell was a business acquaintance of both Dixon and Yates, Hughes very early in the negotiations assigned Wenzell the task of using "such influence as he had with the private utility people to impress upon them the need for prompt action." In the weeks that followed, Wenzell kept in constant touch with the sponsors, and frequently was the only representative of the Government at important meetings concerning the project. He participated in intragovernmental analyses; he supplied the sponsors with vital information on the cost of money, and that information was subsequently made the basis for the sponsors' proposals; he urged the sponsors to refine their figures after the initial proposal was rejected; he was used by the Budget Bureau not only as a consultant on the cost of money, but also as an advisor on the total cost of the project. In fact, Wenzell's activities were so extensive that the Court of Claims was led to the conclusion that "Hughes really used Wenzell as an expediter. . . . He [Wenzell], no doubt, was able to give to Hughes a better overall view of events than any other person, and did, we should suppose, expedite the formulation of the proposal which formed the basis for the later negotiation of details and exact figures." — Ct. Cl. —. Considering that Wenzell was the Government's major representative in the formative negotiations of this multimillion dollar contract, we think it

would be unrealistic to say that he was not the type of "agent" to whom Section 434 was intended to apply.

The respondent suggests that Wenzell was not an "agent of the United States" because "he took no oath of office; he had no tenure; he served without salary, except for $10 per day in lieu of subsistence; his duties were merely consultative, were occasional and temporary and were not prescribed by statute; and he was permitted to continue in his position as one of the vice presidents of First Boston and to draw his salary from that company." But surely, these factors cannot be determinative of the question. A key representative of the Government who has taken no oath of office, who has no tenure, and who receives no salary is just as likely to subordinate the Government's interest to his own as is a regular, full-time, compensated civil servant. This is undoubtedly why the statute applies not only to those who are "employed" by the Government, but also to "whoever . . . acts" as an agent for the Government.[15] In addition, we think that the respondent ignores the relevant facts when it characterizes Wenzell's activities as merely "occasional and temporary." During his association with the Budget Bureau, Wenzell, as we have indicated, was as active a participant in the negotiations as anyone connected with the project. We do not think it would be erroneous to characterize him as the real architect of the final contract. Finally, respondent's reliance upon the fact that Wenzell retained his position with First Boston is misplaced. The key role which Wenzell played in representing the Government was in no way diminished by the fact that he retained his association with First Boston during his period of consultancy. It was Wenzell's position with

[15] Irregular employees of the Government, whether compensated or not, have always been considered by the Executive Branch to be subject to the conflict-of-interest statutes. See, e. g., 40 Ops. Att'y Gen. 168, 289, 294; 41 Ops. Att'y Gen. No. 64.

First Boston which constituted the basis for his conflict of interest, and it would truly be anomalous if we were to adopt the respondent's suggestion that the very fact which creates the conflict of interest also operates to remove Wenzell from the coverage of the statute. This would ignore the purpose of the statute.

The respondent also contends that even if Wenzell qualified as an "agent" of the Government, his activities did not constitute "the transaction of business." We disagree. Although it is true that Wenzell had no authority to sign a binding contract, and that he did not participate in the terminal negotiations which led to the final agreement, nevertheless, those facts do not support the respondent's conclusion that the negotiations in which Wenzell participated were too remote and tenuous to be considered "the transaction of business." Far from being tenuous, the negotiations in which he participated were the very foundation upon which the final contract was based. As the findings of the Court of Claims demonstrate, the preliminary negotiations with which Wenzell was concerned dealt primarily with the cost of the project, and particularly with the "all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant." If the sponsors and the Government had not agreed on the cost of construction and on the cost of money, no contract would have been made, because the cost of power supplied to the AEC was to have been based upon both of those factors. As the Court of Claims found: "It is well known that the cost of money played an important part in the cost of the entire project and in the price at which the energy could be produced and sold. . . . It was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and . . . the cost of money is the largest component of cost included in the capacity charge." The importance of the negotiations between Wenzell and the sponsors is

emphasized by the fact that both the first and second proposals were conditioned upon the sponsors' being able to borrow money at the interest rate specified by Wenzell and First Boston. Although Wenzell did not participate in the ultimate negotiations, those negotiations cannot be divorced from the events which led up to the submission of the second proposal. The final contract was not negotiated in a vacuum. The second proposal, upon which Wenzell had expended so much time and energy, constituted both the framework and the guidelines of the final contract. And although "there were numerous changes in and additions to the terms set forth in the proposal," the Court of Claims specifically found that "[i]n a general way, the contract was within the terms of the proposal."

We therefore think that the respondent unrealistically assesses the facts when it characterizes the negotiations which led to the contract as a series of disconnected transactions. On the contrary, they were a continuous course of dealings which were closely interrelated and interconnected. Wenzell played a key role in the early stages of the negotiations, and it was quite likely that the contract would never have come into fruition had he not participated on behalf of the Government. The Court of Claims recognized the importance of the preliminary negotiations and of Wenzell's activities during those negotiations. It said that "[w]hile the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work." — Ct. Cl. —. If the activities of a government agent have as decisive an effect upon the outcome of a transaction as Wenzell's activities were said by the Court of Claims to have had in this case, then a refusal to characterize those activities as part of a business transaction merely because they occurred at an early stage of the negotiations is at war with the obvious purpose of the statute. To limit the application of the stat-

ute to government agents who participate only in the final formation of a contract would permit those who have a conflict of interest to engage in the preliminary, but often crucial stages of the transaction, and then to insulate themselves from prosecution under Section 434 by withdrawing from the negotiations at the final, and often perfunctory stage of the proceedings. Congress could not possibly have intended such an obvious evasion of the statute.

The second question which we must consider in determining whether Wenzell's activities fell within the scope of the statute is whether he was "directly or indirectly interested in the pecuniary profits or contracts" of the sponsors. We think that the findings of the lower court demonstrate that, at the very least, Wenzell had an indirect interest in the contract which the sponsors were attempting to obtain. That interest may be described as follows: Wenzell was an officer and executive of First Boston; he not only shared in the profits which First Boston made during the year, but he also received a bonus for any business which he brought to the firm; if a contract between the Government and the sponsors was ultimately agreed upon, there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing for the proposed Memphis project; if First Boston did receive the contract, it might not only profit directly from that contract, but it would also achieve great prestige and would thereby be likely to receive other business of the same kind in the future; therefore, Wenzell, as an officer and profit-sharer of First Boston, could expect to benefit from any agreement that might be made between the Government and the sponsors.

The respondent urges that Wenzell had no interest because First Boston had no more than a mere hope that it might receive the financing work were the negotiations

in which Wenzell participated to culminate in a contract. However, the findings of fact and the conclusions of the Court of Claims belie the respondent's assertion. First Boston had arranged the financing on the OVEC project and had acquired a reputation in the area of private power financing. Wenzell had also acquired a certain expertise in this area by virtue of his previous work for the Budget Bureau in preparing the TVA analysis. It was therefore probable that First Boston's services would again be utilized should the sponsors obtain a contract to construct a project similar to OVEC. That this expectation was not baseless is demonstrated by the fact that as early as February 20, 1954, Dixon's counsel expressed apprehension about Wenzell's duality, since it seemed likely that First Boston would receive the financing contract. Even Wenzell must have thought very early in the negotiations that First Boston would probably be retained to do the financing, for on February 23, 1954, he told Hughes that should First Boston be retained, he might be criticized for having "improperly used his position in the Bureau to obtain business for First Boston." Wenzell's apprehension was confirmed by First Boston's counsel, who advised Wenzell to resign from the Bureau of the Budget "forthwith and in writing." This advice was undoubtedly premised on the realization that First Boston stood a good chance of receiving the financing contract. The Court of Claims recognized that from the outset there was a "substantial possibility" that First Boston would be retained. It said:

> "There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such

enterprises, might be employed by the company which got the contract." —Ct. Cl. —.

"He [Wenzell] had an interest in First Boston which company, *by the logic of circumstances*, might be offered the work of arranging the financing of the project when and if a contract for the project should be made." —Ct. Cl. —. (Emphasis added.)

It was the "logic of circumstances" referred to by the Court of Claims that placed Wenzell in the ambivalent position at which the statute is aimed. Wenzell, as an agent of the Government, was entrusted with the responsibility of representing the Government's interest in the preliminary stages of a very important contract negotiation. However, because the sponsors were in a position to affect the fortunes of himself and his firm, he was, to say the least, subconsciously tempted to ingratiate himself with the sponsors and to accede to their demands, even though such concessions might have been adverse to the best interests of the Government. By thus placing himself in this ambiguous situation, Wenzell failed to honor the objective standard of conduct which the statute prescribes.

The respondent suggests that Wenzell was never really subject to any temptations because he was not in a position whereby he could have sacrificed any of the Government's interests. Once again, however, the respondent takes an unrealistic view of the facts. We have already described how important a role Wenzell played in this transaction. In fulfilling that role, Wenzell, on numerous occasions could have taken action that would have favored the sponsors to the detriment of the Government. For example, he could have concurred too easily with the sponsors as to specific items of the proposals or of the cost estimates; or

he could have failed to press the Government's position on items of cost vigorously enough; or he could have suggested acceptance by the Government of a proposal which, for one reason or another, should not have been approved. However, we need not deal exclusively in the realm of conjecture. The findings of the Court of Claims disclose numerous instances in which Wenzell seemed to be more preoccupied with advancing the position of First Boston or the sponsors than with representing the best interests of the Government. For example, after the joint TVA-AEC analysis was made available, Wenzell helped draft a letter which the sponsors planned to submit to the Government as a rebuttal to the unfavorable conclusions contained in the analysis. We should think that one who represented the Government would be more interested in defending the Government's position than in helping the sponsors to attack it. On another occasion, Wenzell performed a "personal favor" for Dixon by obtaining some information on the cost of money from his associates at First Boston. As it later turned out, this information was to constitute the framework around which the sponsors constructed their proposal. By submitting the information to Dixon on the stationery of First Boston, and by subsequently arranging a meeting between the sponsors and some officers of First Boston so that the information could be confirmed, Wenzell was able constantly to keep First Boston in the forefront of the picture.[9] It is therefore not surprising either that the sponsors did choose First Boston to conduct the major part of the financing, or that Woods, the Chairman of First Boston, subsequently thought that "the financing which First Boston had been retained to handle had flowed directly from the conversa-

[9] That Wenzell, on at least two occasions, brought senior officers from First Boston with him to negotiating sessions is further evidence of the fact that Wenzell frequently attempted to place First Boston in a position of predominance.

tion which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in connection with its power policy." That Wenzell's primary allegiance was to First Boston and that his loyalty to the Government was a fleeting one is shown by the fact that after he had finished his report on TVA in 1953, he showed a copy of that confidential document to Woods, even though he had been expressly told by Dodge to show the report to no one; and by the further fact that when First Boston agreed to do the financing, Wenzell did not keep his promise to Dodge to inform the Budget Bureau of any arrangement between First Boston and the sponsors and to submit that arrangement to the Bureau for approval. It may be true, as the respondent asserts, that none of Wenzell's activities to which we have alluded adversely affected the Government in any way. However, that question is irrelevant to a consideration of whether or not Wenzell violated the statute. As we have indicated, the statute is preventive in nature; it lays down an absolute standard of conduct which Wenzell violated by entering into a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute.[17]

[17] The fact that First Boston subsequently decided not to accept a fee is irrelevant to a determination of whether Wenzell violated the statute. First Boston's decision was not reached until many months after Wenzell had terminated his connection with the Bureau of the Budget. At the time Wenzell represented the Government which is the period crucial to our determination, First Boston fully expected to accept a fee for services which it might render, and Wenzell had every reason to expect that he would benefit from any profits that First Boston might make. It was this expectation that infected the transaction, and the taint cannot be removed by a subsequent unilateral decision on the part of First Boston to forego its fee.

Finally, some mention must be made of certain factors which the Court of Claims cited in reaching the conclusion that Wenzell had not violated the statute. First, both the court below and the respondent intimate that Wenzell could not have expected to benefit from the contract because there was no formal contract or understanding between First Boston and the sponsors to the effect that First Boston would be retained should the sponsors enter into an agreement with the Government. However, we do not think that the absence of such a formal agreement or understanding is determinative. The question is not whether Wenzell was certain to benefit from the contract, but whether the likelihood that he might benefit was so great that he would be subject to those temptations which the statute seeks to avoid. That there was more than a mere likelihood in this case has already been shown. Second, the Court of Claims stressed the fact that Wenzell's goal of advancing the cause of private power coincided with the Administration's general objective. However, that fact cannot serve to exempt Wenzell from the coverage of the statute. In fact, the more evidence an agent gives of agreement with the policies of the Administration, the more responsibility he is likely to be given, and in case of a conflict of interest, the greater is the possible injury to the Government. Third, the Court of Claims relied strongly on the fact that Wenzell did not think that he was involved in a conflict-of-interest situation. How Wenzell could have thought otherwise following the admonitions of both Dixon's counsel and First Boston's counsel and his own statements in that regard is difficult to understand. However, even assuming that Wenzell did not think there was a conflict, that fact is irrelevant. As we have shown, the statute establishes an objective, and not a subjective standard, and it is therefore of little moment whether the agent thought he was violating the statute if the objective facts show that there

was a conflict of interest. Finally, both the Court of Claims and the respondent make much of the fact that Wenzell's immediate superiors in the Bureau of the Budget knew of his activities and of his interest in First Boston. True as this fact is, it is significant, we think, that no one in the AEC, which was the governmental contracting agency, and which had expressed reluctance about the contract throughout the negotiations, had knowledge until December 1954 that "Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project." In any event, the knowledge of Wenzell's superiors and their approval of his activities does not suffice to exempt Wenzell from the coverage of the statute. Neither Section 434 nor any other statute empowered his superiors to exempt him from the statute, and we are convinced that it would be contrary to the purpose of the statute for this Court to bestow such a power upon those whom Congress has not seen fit to so authorize. Congress undoubtedly had a very specific reason for not conferring such a power upon high level administrators. It recogized that an agent's superiors may not appreciate the nature of the agent's conflict, or that the superiors might, in fact, share the agent's conflict of interest. The prohibition was therefore designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents. It is not surprising therefore that we have consistently held that no government agent can properly claim exemption from a conflict-of-interest statute simply because his superiors did not discern the conflict. *Ewert* v. *Bluejacket*, 259 U. S. 129; *Prosser* v. *Finn*, 208 U. S. 67.

The thrust of the arguments made by the respondent and adopted by the Court of Claims is that it would be unjust to apply the statute to one who acted as Wenzell did in this case. We cannot agree. The statute is di-

rected at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil. Against this background, it seems clear to us that Wenzell's duality, which aroused the fears of his own counsel and the suspicions of many observers, was the very type of conflict at which the statute is aimed. That Wenzell was aware of his dual position early in the negotiations; that he was advised by his own counsel to resign "forthwith and in writing"; that he did not terminate his association with the Budget Bureau until the final proposal had been submitted; that he never formally resigned his position with the Bureau, as he had been advised to do; and that his activities fall within the literal meaning of the statute have all been demonstrated. In the light of these circumstances, we think that the respondent's reliance upon the so-called equitable considerations in Wenzell's favor is misplaced.

Because of the respondent's assertion that an application of the statute to Wenzell will make it impossible in the future for the Government to obtain the services of private consultants on a part-time basis, we emphasize that our specific holding, on the facts before us, is that § 434 forbids a government agent from engaging in business transactions on behalf of the Government if, by virtue of his private interests, he may benefit financially from the outcome of those transactions.

Second. Having determined that Wenzell's activities constituted a violation of Section 434, we must next consider whether Wenzell's illegal conduct renders the contract unenforceable. It is true that Section 434 does not

specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition. However, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment. *E. g., Miller* v. *Amimon*, 145 U. S. 421; *Bank of the United States* v. *Owens*, 27 U. S. (2 Pet.) 527; 6 Williston, Contracts (rev. ed. 1938), § 1763. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in Section 434.

As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred.

Nonenforcement of contracts made in violation of Section 434 and its predecessor statutes is not a novel remedy. On at least two occasions the Court of Claims has held that the Government could disaffirm contractual obligations arising from transactions which were prohibited by the statutory antecedent to Section 434. *Rankin* v.

United States, supra; Curved Electrotype Plate Co. v. *United States*, 50 Ct. Cl. 258. See also *Michigan Steel Box Co.* v. *United States*, 49 Ct. Cl. 421. In reaching its decision in this case, the Court of Claims appears to have abandoned these precedents, and instead placed great reliance upon our decision in *Muschany* v. *United States*, 324 U. S. 49. However, we find no difficulty in distinguishing that case from the instant situation. The *Muschany* case involved a government land agent whose activities not only were authorized by the National Defense Act of 1940, 54 Stat. 712, but also were found by the Court to be outside the purview of the conflict-of-interest statutes. Therefore, unlike this case, *Muschany* did not involve a contract which resulted from an illegal transaction, and it is consequently understandable that the contract there in question was enforced.[18]

The Court of Claims was of the opinion that it would be overly harsh not to enforce this contract, since the sponsors could not have controlled Wenzell's activities and were guilty of no wrongdoing. However, we think that the court emphasized the wrong considerations. Although nonenforcement frequently has the effect of punishing one who has broken the law, its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. Cf. *Crocker* v. *United States*, 240 U. S. 74, 80–81. It is this inherent difficulty in detecting corruption which requires that con-

[18] The other cases relied upon by the respondent, *United States* v. *Chemical Foundation*, 272 U. S. 1; *Architects Building Corp.* v. *United States*, 98 Ct. Cl. 368, are also distinguishable on the ground that the activities of the government agents there involved were found by the courts not to constitute a violation of any conflict-of-interest statute. Therefore, since the contracts in those cases had not emanated from an illegal transaction, they were enforced.

tracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent. Cf. *Hazelton* v. *Shackells*, 202 U. S. 71, 79. Therefore, even if the result in a given case may seem harsh, and we do not think that such is the case here,[19] that result is dictated by the public policy manifested by the statute. We agree with Judge Jones' statement that "the policy so clearly expressed in 18 U. S. C. 434 leaves no room for equitable considerations. . . . If that policy is to be narrowed or limited by exceptions, it is the function of Congress and not of this court to spell out such limitations and exceptions." — Ct. Cl. — (dissenting opinion).

In concluding that the sponsors were entitled to enforce their contract, the court below expressed the opinion that the Government may not avoid a bad bargain by relying upon a conflict of interest which was directly caused by high officials in the Bureau of the Budget. Of course, the Government could not avoid the contract merely because it turned out to be a bad bargain.[20] See *Muschany* v. *United States*, *supra*, at 66–67. However, that is not the issue before us. The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest. As we have indicated, the public

[19] We do not think that the result in this case is harsh because the sponsors were not as naive regarding the conflict-of-interest question as the Court of Claims implied. They recognized Wenzell's conflict of interest almost from the outset of the negotiations. However, instead of refusing to negotiate with Wenzell or of making it clear both to Wenzell and to all the other interested parties that if Wenzell participated in the negotiations, First Boston would under no circumstances be considered as the financing agent for the project, the sponsors dealt almost exclusively with Wenzell and continually fortified his belief that First Boston would be selected as the financing agent should a contract result from the negotiations.

[20] There is nothing in the findings to show whether the contract here involved was favorable or unfavorable to the Government.

policy embodied in Section 434 requires nonenforcement and this is true even though the conflict of interest was caused or condoned by high government officials. The same strong policy which prevents an administrative official from exempting his subordinates from the coverage of the statute also dictates that the actions of such an official not be construed as requiring enforcement of an illegal contract.[21]

Although nonenforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection which Congress decreed by enacting Section 434.[22]

The judgment of the Court of Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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[21] It should be remembered that the contracting agency, the AEC, had virtually no knowledge of the activities which Wenzell was conducting on behalf of the sponsors during his tenure with the Bureau of the Budget. It may well be that had the AEC known of these facts, it would have insisted that Wenzell be precluded from representing the Government, or, at least, would have scrutinized his recommendations more closely.

[22] The respondent also contends that even if the contract is not enforceable, a recovery *quantum valebat* should be decreed. However, such a remedy is appropriate only where one party to a transaction has received and retained tangible benefits from the other party. *See Crocker* v. *United States*, 240 U. S. 74, 81–82. Since the Government has received nothing from the respondent, no recovery *quantum valebat* is in order.

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1960.

United States, Petitioner, v. Mississippi Valley Generating Co., etc.	On Writ of Certiorari to the United States Court of Claims.

[January 9, 1961.]

Mr. Justice Harlan, whom Mr. Justice Whittaker and Mr. Justice Stewart join, dissenting.

In a case like this controlling legal issues are apt to become blurred under the urge of vindicating a public policy whose importance no one will dispute. However, we sit here not as a committee on general business ethics, but as a court enforcing a specific piece of legislation.

While I am bound to say that the Government's defense to this claim for out-of-pocket expenses incurred in a matter that the Government was once anxious to explore is far from ingratiating,[1] I must agree with the Court that Wenzell's government role in connection with the Mississippi Valley contract, though in the view of the Court of Claims, it was quite peripheral, was sufficient to constitute him one who "acts as an officer or agent of the

[1] Wenzell's superiors in the Government were fully aware of his connection with First Boston and of the possibility that First Boston might later figure in the financing of the contemplated private power project; and with such knowledge they affirmatively acquiesced, and indeed encouraged, his continuing in his consultative role. The power contract, which the Government recognizes was the product of hard bargaining and implicitly concedes was fair, was eventually terminated only because the Government had lost interest in it. The defense of illegality was raised for the first time in this suit, and only after a political storm had arisen over the public versus private power issue. Nevertheless I think the Court is right in considering that all these factors are rendered immaterial by the statute in question.

United States" within the meaning of 18 U. S. C. § 434,[2] and that if he was personally "indirectly interested" in that contract via First Boston the case must go for the Government. But in light of the findings of the Court of Claims I cannot agree that Wenzell was so interested within the contemplation of § 434. In my opinion this Court's contrary conclusion rests upon too loose a view of the controlling statutory phrase.

Referring to the period of Wenzell's governmental service, the Court of Claims concluded:

> "There is not a shadow of evidence that it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal [of the Dixon-Yates group] which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation [Mississippi Valley] which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding."

I do not understand the Court to take issue with this conclusion or with any of the findings of the Hearing Examiner on which it was based. It could not well do so, cf. *Commissioner* v. *Duberstein*, 363 U. S. 278; nor does the Government ask this. Rather, the Court finds

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[2] "§ 434. *Interested persons acting as Government agents.* Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

the prohibited "indirect interest" to consist of Wenzell's expectation in the probability that First Boston, by virtue of its reputation in the field of private power financing and its having previously arranged the financing for a similar project, would eventually share in the financing of this venture.

I do not believe that such a probability alone gives rise to a contaminating interest under § 434. The fact that the probability eventuated into actuality after Wenzell's government service terminated can hardly be relevant, for what the Court, under its view of the statute, correctly says as to the immateriality of First Boston's later waiver of commissions must surely also work in reverse. Whether or not a prohibited interest exists must be determined as of the period during which an individual is acting for the Government. And when the asserted interest arises "indirectly" by way of a subcontract, its existence can, in my opinion, only be found in some commitment, arrangement, or understanding obtaining at that time between the prime contractor and subcontractor.[2] I believe this latter proposition is supported by persuasive considerations.

First. It fits the language of § 434, whereas the Court's view does not. The statute does not speak of the disqualifying factors in terms of expectations or probabilities, but imports a precise standard, that is, a present status or pecuniary interest arising from some existing relationship with the business entity contracting with the Government. Certainly this is true as to an "officer," "agent," or "member" of the contracting enterprise. It is equally true of one disqualified by reason of "being . . . directly . . . interested in the pecuniary profits or contracts" of such an entity. I can see no reason why it should not also be

[2] Whether absence of knowledge of such an arrangement on the part of the individual concerned would be a defense is a matter not presented by this case.

true as to one "indirectly" so interested, requiring in this instance proof of some then existing arrangement between Mississippi Valley and First Boston. I do not mean to suggest that such an arrangement must be evidenced by a formal agreement, for of course any sort of tacit understanding or "gentlemen's agreement" will suffice. But here the Court of Claims has expressly found against the existence of any such thing.

Second. The view which I take of the matter also fits the purposes of § 434. The policy and rationale of the statute are clear: an individual who negotiates business for the Government should not be exposed to the temptation which might be created by a loyalty divided between the interest of the Government and his own self-interest; the risk that the Government will not be left with the best possible transaction is too great. In terms of these factors, a finding of some commitment, arrangement or understanding between the prime contractor and the subcontractor should be required when the contracting officer's adverse interest arises by way of a subcontract, since only where some such arrangement exists can the officer be taken to have known that any undue benefit he confers on the prime contractor will not eventually redound to the profit of some other competing subcontractor.

Here, for instance, it was found below that Mississippi Valley "a month after Wenzell's Government employment ended . . . felt perfectly free to give the bondselling business to whomever it pleased." Hence if Wenzell did in fact confer some undue benefit on Mississippi during the term of his government service (although none is suggested), he must have known that he was conferring that benefit at large, and that if First Boston later were to share in it this would only be the consequence of its having successfully competed against other investment

bankers with similar qualifications. Furthermore, where the government officer's eventual indirect participation in the contract which he has negotiated (by hypothesis improperly) depends on the chance of competition after he has lost the leverage which his position gave, then it would be subject to the additional hazard that although the contractor has received a boon at his hands, all the subcontractor receives is such a normal subcontract as he might have had in any case.

Third. The Court's interpretation of § 434 introduces unnecessary and undesirable uncertainties into the statute. Instead of presenting the individual concerned or the trier of fact with a definite standard for determining whether a disqualifying interest of this kind is present—the existence *vel non* of a commitment or undertaking between the primary and secondary contractors—the question is left at large. The opinion in this case indeed highlights the matter. For after apparently agreeing that a "mere hope" that First Boston might share in the financing of the power contract would not be enough, the Court goes on to describe that eventuality in a variety of ways—that there was "a substantial probability" of it; that it was "probable"; that "it seemed likely"; that it "stood a good chance" of coming to pass; and that it might simply follow from the " 'logic of circumstances' " as a " 'substantial possibility.' ".

Such uncertainty, inherent in the Court's view of the statute, is bound to cause future confusion in an area where the line of demarcation should be clear cut. As time goes on it will face many conscientious persons with the kind of close and subtle niceties which, as every judge and lawyer knows, often attend a matter of possible disqualification. Such illusive factors should not be imported into a statute governing the conduct primarily of laymen serving the Government.

Fourth. I think there is affirmative ground in the pattern of conflict-of-interest legislation for not attributing to Congress the purpose which the Court here does. The statute in question is the most general conflict-of-interest enactment, but there are other provisions of law, as well as federal regulations, which also deal with the subject. Particularly 5 U. S. C. § 99 and 18 U. S. C. § 284 indicate a different approach to the problem. The two statutes disqualify former officers and employees of governmental agencies or departments for a period of two years from prosecuting or aiding in any way in the prosecution of a claim which had been pending at the time of their employment. A similar approach is suggested by this Court's Rule 7 which prohibits clerks and secretaries from practicing before this Court for a period of two years after leaving the Court, and from participating in any way in a case which was before the Court during the term of their employment. Cf. Canon 36 of the Canons of Professional Ethics of the American Bar Association.

The interpretation which the Court today gives 18 U. S. C. § 434, if it is to be taken as more than a disposition of this particular controversy, will go a long way to assimilating that statute in practical effect to the absolute disqualification type of provision, for certainly where criminal sanctions are involved no prudent man will risk later acquiring an interest in a contract which he helped to negotiate during a previous term of government employment. Whether such a rigid rule, of a kind traditional in the legal profession, should also be regarded as one of general morality in the public service may, of course, well be debated. However, Congress did not, in my view, enact this precept into law in the present statute, and where it has enacted this policy it has done so with a clarity and precision, which I feel the present reading of § 434 lacks.

I would affirm.